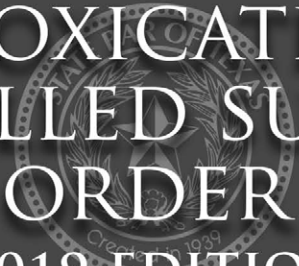


# TEXAS CRIMINAL PATTERN JURY CHARGES



INTOXICATION,  
CONTROLLED SUBSTANCE  
& PUBLIC ORDER OFFENSES  
2019 EDITION

**TEXAS CRIMINAL  
PATTERN JURY CHARGES**

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**Intoxication, Controlled Substance &  
Public Order Offenses**

# TEXAS CRIMINAL PATTERN JURY CHARGES

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## Intoxication, Controlled Substance & Public Order Offenses

Prepared by the  
COMMITTEE  
on  
PATTERN JURY CHARGES—CRIMINAL  
of the  
STATE BAR OF TEXAS



Austin 2019

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## PREFACE

The Pattern Jury Charges Committee—Criminal was first formed in 2005 with the goal of drafting criminal instructions in plain language. The Committee was challenged with addressing both the need to state the law in statutory terms and the need to provide charges in language juries could understand. To this end, the Committee designed an outline for the charges that explicitly states the relevant statutes and legal definitions and then applies the law to the facts in commonsense language. Each section is clearly identified, and the format was designed to enhance readability for the jury.

When an effective template was developed, the Committee drafted the first volume: *Texas Criminal Pattern Jury Charges—Intoxication and Controlled Substances*. The Committee was then able to produce four more volumes at a rapid pace. However, the evolutionary nature of the process resulted in some issues with the organization. For example, to make the first volume a complete, stand-alone set of instructions, a general charge, special instructions, and punishment instructions were included with the charges on driving while intoxicated, possession, and the like. In the original *Crimes against Persons* volume, chapters on transferred intent and party liability were included to make the volume more useful, but those instructions—like the general charge, special instructions, and punishment instructions—apply in trials for other crimes than just those covered in that volume.

As the Committee's leadership began planning for additional material, it became clear that a better organization of the charges would improve the value of the series enormously. To accomplish this, the Committee began to both update and reorganize the series for greater utility and greater potential for expansion. The Committee therefore took content from various volumes of the original series and added new subject matter to create the new *Texas Criminal Pattern Jury Charges*, released in 2015 and 2016. The series will continue to be updated and expanded. This latest edition of the *Intoxication, Controlled Substance & Public Order Offenses* volume contains new instructions on tampering with a governmental record, as well as statutory and case law updates throughout the book.

As with the initial set of volumes, the Committee has provided a significant amount of material on the underlying law to aid practitioners in using the charges. This varies from the style of the civil charges. But precisely because the Committee's approach is significantly different from that of more traditional criminal charges, the Committee felt it was important to ensure the attorney had all the information needed to use the charges with confidence.

This work could not have been completed without the commitment, dedication, and experience of many Committee members, both past and present. In particular, the Committee would like to thank Alan Levy for his leadership as the Committee's inaugural chair and to Judge Cathy Cochran for her participation and support as liaison to the Texas Court of Criminal Appeals until her retirement from the Committee. We are also

## PREFACE

indebted to numerous other lawyers and judges who read the drafts and offered ideas for improvement—ranging from matters of substantive law to those having to do with style, format, and utility. In addition, we would like to thank the staff of TexasBarBooks, who provide invaluable support and assistance in bringing these volumes to print.

Finally, the Committee would like to express its profound gratitude to Professor George Dix, whose dedication and contributions to this Committee from its earliest days have made this project possible. The Committee came to rely on his hard work, insightfulness, and leadership as the Committee's chair. Not only that, his sense of humor and wit both enlivened and enlightened our discussions, and for this and more, the Committee remains in his debt.

—Wendell Odom, Jr., *Chair*, and Emily Johnson-Liu, *Vice-Chair*

# INTRODUCTION

## 1. PURPOSE OF PUBLICATION

The purpose of this volume is to assist the bench and bar in preparing the court's charge in jury cases. It provides general instructions for the guilt/innocence stage of the trial concerning intoxication, controlled substance, and public order offenses. The jury instructions are suggestions and guides to be used by a trial court if they are applicable and proper in a specific case. Of course, the exercise of professional judgment by the attorneys and the judge is necessary in every case.

## 2. SCOPE OF PATTERN CHARGES

A charge should conform to the pleadings and evidence of the particular case. Occasions will arise for the use of instructions not specifically addressed herein. Even for the specific instructions that are addressed in this volume, trial judges and practitioners should recognize that the Committee may have erred in its perceptions and that its recommendations may be affected by future appellate decisions and statutory changes.

## 3. PRINCIPLES OF STYLE

a. *Basic philosophy.* This volume embodies the Committee's recommendation that several basic and reasonable changes can and should be made to how juries are instructed in criminal trials. Although they are the result of long and careful consideration by members drawn from the bench, prosecutors' offices, defense practice, and academia, the jury instructions in this volume have no official status. Appellate courts are unlikely to regard trial judges' refusal to use the Committee's jury instructions as reversible error. These instructions will be used, then, only if trial judges are willing to exercise their considerable discretion to adopt them in particular cases.

b. *Simplicity.* Criminal litigation by its nature often raises difficult questions for juries to resolve. Compound that difficulty with the current practice of drafting instructions almost verbatim from the statutes, occasionally inherently ambiguous themselves, and an onerous task lies ahead of juries. The Committee concluded that plain language in criminal jury instructions is both desirable and permissible and has therefore sought to be as brief as possible and to use language that is simple and easy to understand.

c. *Bracketed material.* Several types of bracketed material appear in the jury instructions. In a bracketed statement such as "[indictment/information]," the user must choose between the terms or phrases within the brackets. The choices are separated by forward slash marks. Alternative letters or phrases may also be indicated by the use of brackets. For example, "county[ies]" indicates a choice between the words "county" and "counties." In a bracketed statement such as "[name of accomplice]," the user is to substitute the name of the accomplice rather than retaining the bracketed material verbatim. Material such as "[include if applicable: . . .]" and "[describe purpose]" provides guide-

## INTRODUCTION

lines for completing the finished jury instruction and should not be retained verbatim in the document.

d. *Use of masculine gender.* For simplicity, the jury instructions in this volume use masculine pronouns. These pronouns are not enclosed in brackets, but the user should, when drafting jury instructions for a particular case, replace the pronouns with feminine versions wherever appropriate. The jury instructions in this volume do, however, use disjunctive pairs of masculine and feminine pronouns when the identity of a person will not be known at the time the instructions are given to the jury (for example, “have your foreperson sign his or her name”).

## 4. COMMENTS AND CITATIONS OF AUTHORITY

The discussions and comments accompanying each jury instruction provide a ready reference to the law that serves as a foundation for the instruction. The primary authorities cited in this volume are the Texas Penal Code, the Texas Code of Criminal Procedure, and Texas case law.

## 5. USING THE PATTERN CHARGES

For general guidelines on drafting a criminal jury charge, refer to the section titled “Quick Guide to Drafting a Jury Charge,” which follows this introduction. For matters specific to any instruction included in this volume, refer to the commentary in chapter 1 of *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions*, any general commentary that begins the chapter containing the instruction in question, and the commentary specific to and following the instruction itself. Finally, preparation of a proper charge requires careful legal analysis and sound judgment.

## 6. INSTALLING THE DIGITAL DOWNLOAD

The complimentary downloadable version of *Texas Criminal Pattern Jury Charges—Intoxication, Controlled Substance & Public Order Offenses* (2019 edition) contains the entire text of the printed book. To install the digital download—

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## 7. FUTURE REVISIONS

The contents of the jury instructions depend on the underlying substantive law relevant to the case. The Committee expects to publish updates as needed to reflect changes and new developments in the law.

## QUICK GUIDE TO DRAFTING A JURY CHARGE

### The Main Charge

- Examine the indictment to determine the relevant Texas Penal Code provisions.
- Compare the language of the offense or offenses charged in the indictment with the language of the relevant Penal Code provisions. In general, the indictment should track the statutory language, alleging all the elements of a particular offense or offenses.
- For each count in the indictment, determine what the elements of the offense are. Even if the indictment does not allege all the elements of an offense, the jury charge must do so. If the indictment alleges *more* than the Penal Code provision requires, it may be possible to omit the unnecessary language in the jury charge.
- With few exceptions, all offenses require both forbidden **conduct** and one or more **culpable mental states**. Some offenses also require a certain **result**—for example, homicide, which requires that the defendant’s **conduct** cause a **result**, death (*see* [Tex. Penal Code § 19.01](#)). Still other offenses include a **circumstance surrounding conduct**. For example, aggravated assault of a public servant under [Tex. Penal Code § 22.02\(b\)\(2\)\(B\)](#) requires that the person assaulted be a public servant, a **circumstance surrounding conduct**, as well as requiring the forbidden **conduct** and a proscribed **result**.

For each offense you submit to the jury, then, you must ask:

1. What is the forbidden **conduct**?
  2. Does the offense require a certain **result**?
  3. Does the offense include one or more **circumstances surrounding conduct**?
- Next determine what **culpable mental states** are required to commit the offense. A **culpable mental state** may be required as to **conduct**, a **result**, a **circumstance surrounding conduct**, or all these elements. For example, in the case of aggravated assault of a public servant, when bodily injury is alleged, the defendant must intentionally, knowingly, or recklessly cause a **result**, bodily injury. The statute also requires, however, that the state prove that the defendant *knew* the victim was a public servant—a **circumstance surrounding conduct**. In most cases, the statutory provision itself will indicate which **culpable mental states** apply, but sometimes case law will dictate that a **culpable mental state** not expressly included in the statute is also required. Finally, you must be careful to confine each **culpable mental state** to the element to which it applies. For example, in the case of injury to a child, the relevant **culpable mental states** apply to the **result**, not the **conduct** (*see* [Tex. Penal Code § 22.04\(a\)](#); *Haggins v. State*, 785 S.W.2d 827 (Tex. Crim. App. 1990)).

- Many offenses may be committed in more than one statutory manner. For example, injury to a child may be committed by either an affirmative act—for example, hitting the child—or by an omission—for example, failing to provide medical care (see [Tex. Penal Code § 22.04\(a\)](#)). For each offense in the indictment, you must ask whether the state has alleged alternative statutory theories of how the offense was committed. If so, you will submit these theories to the jury in the disjunctive. The jurors must be unanimous that the state has proved the offense, but they need not be unanimous about the specific statutory manner. Do *not*, however, submit a theory to the jury if it (1) is not alleged in the indictment or (2) is not supported by the evidence adduced at trial.
- Other offenses define distinct statutory acts or results, and the jury must be unanimous on the specific act or result. For example, simple assault may be committed by causing bodily injury or by threatening another with imminent bodily injury (see [Tex. Penal Code § 22.01\(a\)\(1\), \(2\)](#)). These are separate and distinct criminal acts, so the jury must be unanimous about which act the defendant committed. You should not submit these acts in the disjunctive unless you also inform the jury that it must be unanimous about one specific act.
- If the indictment contains multiple counts, determine whether the state is seeking a conviction on each count or has alleged them in the alternative—for example, capital murder under [Tex. Penal Code § 19.03](#) in the first count and murder under [Tex. Penal Code § 19.02](#) in the second count. The jury must not be allowed to convict the defendant for two offenses when one is a lesser included offense of the other.
- Determine which unanimity instruction to give. In general, the rule is that when the state is alleging that the defendant committed *one* offense in one of two or more ways, the jury need not be unanimous—for example, sexual assault by penetration with the penis *or* a finger. In contrast, when the state is alleging that the defendant committed *one* of two or more acts, each of which could constitute a separate offense, the jury must be unanimous as to which act was committed—for example, sexual assault by penetration of the sexual organ *or* the anus of the victim (see [Tex. Penal Code § 22.011\(a\)\(1\)\(A\)](#)).

## Defensive Matters and Lesser Included Offenses

- On request, determine if any **defenses** or **affirmative defenses** apply in the case. If so, include them, taking care to explain to the jury which party has the burden of proof.
- On request, determine if any lesser included offense instructions should be given. Ask the party who is requesting the lesser included offense instruction to explain what evidence raises that instruction.



### **Use of Evidence Instructions and Special Instructions**

- On request, give a limiting instruction if extraneous offenses or bad acts have been introduced. Be careful to specifically identify the particular purpose for which the evidence was offered. *Do not* give a laundry-list instruction—for example, “intent, knowledge, scheme, plan, opportunity, or motive.”
- Determine if any special instructions, such as an instruction on accomplice witnesses or on the law of parties, should be given.
- Determine if any special issue instructions, such as a deadly weapon finding, should be included in the guilt/innocence phase instructions.

### **Putting the Charge Together**

- Give general instructions to be included in every case and, if applicable, an instruction on the defendant’s failure to testify.
- If multiple defendants are on trial, give a complete set of instructions for each defendant.
- Attach appropriate verdict forms. There should be one verdict form for each separate count or indictment that is submitted to the jury.
- Submit the proposed charge to each party for objections or special requests and modify the charge if appropriate.

CHAPTER 40      INTOXICATION OFFENSES

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## I. General Matters

### CPJC 40.1 Definition of “Intoxication”

The definition of “intoxication” in jury instructions in driving while intoxicated prosecutions is less influenced by the pleadings than has traditionally been the case.

In *State v. Barbernell*, 257 S.W.3d 248 (Tex. Crim. App. 2008), the court of criminal appeals made clear that a charging instrument for driving while intoxicated need no longer allege anything regarding the specific definitions of intoxication under [Tex. Penal Code § 49.01\(2\)](#). Under *Barbernell*, the charging instrument need only allege that the named accused “while operating a motor vehicle in a public place, was . . . intoxicated.” *Barbernell*, 257 S.W.3d at 249.

Consequently, which statutory options are properly included in the instructions will be determined by the evidence produced at trial and will be unaffected by the pleadings.

However, if the state alleges a particular theory of intoxication in the charging instrument (i.e., loss of normal use or *per se* intoxication), the application section of the jury charge should restrict the jury’s consideration only to that allegation and not the alternate. See *Crenshaw v. State*, 378 S.W.3d 460, 467 (Tex. Crim. App. 2012). In addition, the evidence will affect which intoxicants can be included in the first prong of the definition of intoxicated: “not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body.” The application paragraph should reflect the evidence as actually presented in court, and the definition of intoxication should be limited to the evidence presented. Compare *Burnett v. State*, 541 S.W.3d 77 (Tex. Crim. App. 2017) (when evidence only supports intoxication by alcohol, submission of full definition in application paragraph was in error), with *Ouellette v. State*, 353 S.W.3d 868 (Tex. Crim. App. 2011) (submission of full definition of intoxication warranted by evidence).

**CPJC 40.2    Definition of “Motor Vehicle”**

The definition of “motor vehicle” is based on [Tex. Penal Code § 49.01\(3\)](#), which incorporates [Tex. Penal Code § 32.34\(a\)](#). This definition seems incomplete; there appears to be agreement that despite the statutory provisions, the definition should include a requirement that the device be self-propelled. The Texas Transportation Code states: “[m]otor vehicle’ means a self-propelled vehicle or a vehicle that is propelled by electric power from overhead trolley wires. The term does not include an electric bicycle or an electric personal assistive mobility device, as defined by Section 551.201.” *See* [Tex. Transp. Code § 541.201\(11\)](#).

The statutory definition is probably at best unhelpful, although there is seldom any need for careful definition of the term.

The Committee concluded that despite the statutory provision, trial judges could properly use more accurate definitions. Instructions could, for example, include:

“Motor vehicle” means every vehicle which is self-propelled, and includes a passenger car, or motorcycle, or light truck, or truck, tractor, or farm tractor, or road tractor, or truck, or bus.

This definition is apparently widely used. *See, e.g., Porter v. State*, [921 S.W.2d 553](#), 555 (Tex. App.—Waco 1996, no pet.).

Alternatively, trial judges might appropriately use the following:

“Motor vehicle” means an automobile, truck, motorcycle, tractor, bus, or any other device in, on, or by which a person or property is or may be transported or drawn on a highway, except a device used exclusively on stationary rails or tracks.

**CPJC 40.3    Definition of “Operate”**

The instructions in this chapter do not define the term *operate*. The court of criminal appeals in *Kirsch v. State*, 357 S.W.3d 645 (Tex. Crim. App. 2012), held that the trial court erred in defining the term in jury instructions. “[N]othing in our case law suggests that a risk exists that jurors may arbitrarily apply an inaccurate definition to the term ‘operate’ or that an express definition is required to assure a fair understanding of the evidence.” *Kirsch*, 357 S.W.3d at 650.

## CPJC 40.4 “Synergistic Effect” Instruction

The Committee recommends the so-called synergistic effect instruction, which is included at the end of each of the relevant statutes units of the instructions in this chapter.

Use of a synergistic effect instruction was upheld against certain challenges in *Gray v. State*, 152 S.W.3d 125 (Tex. Crim. App. 2004). Judge Cochran, joined by Judge Meyers, dissented on the ground that the instruction “is not part of the law applicable to the case, and it is a comment on the weight of the evidence.” *Gray*, 152 S.W.3d at 138 (Cochran, J., dissenting). The majority characterized the contention that the instruction was a comment on the weight of the evidence as one presented by one of Gray’s grounds for review that was refused. “We do not address that claim today.” *Gray*, 152 S.W.3d at 134.

The Committee believed that the instruction is a part of the substantive definition of the statutory terms and thus should not, and ultimately will not, be regarded as a prohibited comment.

*Gray* was reaffirmed in *Otto v. State*, 273 S.W.3d 165, 170 (Tex. Crim. App. 2008). *Otto* held that when the state was limited to proving intoxication on alcohol, the jury instruction expanded beyond the charging instrument if it contained a concurrent causation instruction permitting conviction on proof that the defendant’s intoxication was caused concurrently by alcohol and another substance. The instruction recommended by the Committee contains no such concurrent causation provision.

The instruction does not require that the defendant be aware that the medication or other substance will interact with the alcohol and increase the alcohol’s intoxicating effects. Some members of the Committee believed that fairness requires that the synergistic effect analysis be used only if the evidence shows the defendant was aware that the other substance would have this impact.

**CPJC 40.5 “No Defense” Instruction**

[Tex. Penal Code § 49.10](#) provides that “[i]n a prosecution under Section 49.03, 49.04, 49.045, 49.05, 49.06, 49.065, 49.07, or 49.08, the fact that the defendant is or has been entitled to use the alcohol, controlled substance, drug, dangerous drug, or other substance is not a defense.”

Under this provision, a jury might be instructed as follows:

The fact that the defendant is or has been entitled to use the alcohol, controlled substance, drug, dangerous drug, or other substance is not a defense.

The Committee does not recommend such an instruction, because this is too likely to be a prohibited comment on the evidence.



**CPJC 40.6 “No Culpable Mental State Requirement” Instruction**

The Texas Penal Code provides:

(a) Notwithstanding Section 6.02(b), proof of a culpable mental state is not required for conviction of an offense under this chapter.

(b) Subsection (a) does not apply to an offense under Section 49.031 [possession of alcoholic beverage in motor vehicle].

[Tex. Penal Code § 49.11.](#)

Under this provision, a jury might be instructed as follows:

Proof of a culpable mental state is not required for conviction of the charged offense.

The Committee does not recommend such an instruction, because this is too likely to be a prohibited comment on the evidence.

**CPJC 40.7 “Refusal” Instruction**

The Texas Transportation Code provides that “[a] person’s refusal of a request by an officer to submit to the taking of a specimen of breath or blood, whether the refusal was express or the result of an intentional failure to give the specimen, may be introduced into evidence at the person’s trial.” [Tex. Transp. Code § 724.061](#).

Until *Bartlett v. State*, [270 S.W.3d 147](#) (Tex. Crim. App. 2008), there was some question whether in a driving while intoxicated trial the instructions could inform the jury of the substance of the statutory provision.

In *Bartlett*, the court of criminal appeals—applying the statutory prohibition against comments on the evidence—held that a trial judge erred in giving the following instruction:

You are instructed that where a defendant is accused of violating Chapter 49.04, Texas Penal Code, it is permissible for the prosecution to offer evidence that the defendant was offered and refused a breath test, providing that he has first been made aware of the nature of the test and its purpose. A Defendant under arrest for this offense shall be deemed to have given consent to a chemical test of his breath for the purpose of determining the alcoholic content of his blood.

The prosecution asks you to infer that the defendant’s refusal to take the test is a circumstance tending to prove a consciousness of guilt. The defense asks you to reject the inference urged by the prosecution and to conclude that because of the circumstances existing at the time of the defendant’s refusal to take such test, you should not infer a consciousness of guilt.

The fact that such test was refused is not sufficient standing alone, and by itself, to establish the guilt of the Defendant, but is a fact which, if proven, may be considered by you in the light of all other proven facts in deciding the question of guilt or innocence. Whether or not the Defendant’s refusal to take the test shows a consciousness of guilt, and the significance to be attached to his refusal, are matters for your determination.

*Bartlett*, [270 S.W.3d at 149](#).

Judge Johnson joined the opinion of the court, reasoning that the second and third paragraphs of the instruction impermissibly “drew attention to the refusal and were likely to have enhanced the apparent importance of it as evidence of guilt.” *Bartlett*, [270 S.W.3d at 155](#) (Johnson, J., concurring).

In fact, however, the reasoning of the *Bartlett* majority would have applied even if the trial judge had limited the instruction to the first of its three paragraphs. The opinion of the court acknowledged this when it summarized: “. . . we hold that a jury

instruction informing the jury that it may consider evidence of a refusal to take a breath test constitutes an impermissible comment on the weight of the evidence.” *Bartlett*, 270 S.W.3d at 154.

The Committee concluded that, under *Bartlett*, any instruction on admitted evidence of the defendant’s refusal to submit to the taking of a blood or breath sample is impermissible. Consequently, the Committee’s proposed instructions do not include such a provision.

**CPJC 40.8 Limited Use of Breath Test Evidence**

In those cases in which the state has not introduced retrograde extrapolation evidence regarding what the breath test results suggest was the defendant's alcohol concentration at the time of the driving, the jury might be instructed as follows:

You are instructed that evidence of the breath test administered to the defendant was admitted for the sole purpose of showing, if it does, that the defendant consumed alcohol. You are not to consider the breath test as evidence of the defendant's alcohol concentration, if any, at the time he was driving.

In *State v. Mechler*, [153 S.W.3d 435](#) (Tex. Crim. App. 2005), the court of criminal appeals indicated the following:

We recently held [in *Stewart v. State*, [129 S.W.3d 93](#), 97 (Tex. Crim. App. 2004)] that intoxilyzer results are probative without retrograde extrapolation testimony. Mechler's intoxilyzer results indicate that Mechler had consumed alcohol. As a result, they tend to make it more probable that he was intoxicated at the time of driving under both the per se and impairment definitions of intoxication. Mechler concedes that this factor weighs in favor of admissibility.

*Mechler*, [153 S.W.3d at 440](#).

*Mechler* held that the trial judge erred in excluding intoxilyzer results offered without extrapolation testimony under Texas Rule of Evidence 403 balancing analysis.

Neither *Stewart* nor *Mechler* determined whether, when breath test evidence is admitted without extrapolation testimony, it is best limited to consideration on whether the defendant consumed alcohol. The instruction suggested above would so limit it.

Proponents of an instruction as set out above also contend that when such extrapolation evidence has not been produced, the jury should not be instructed that it may find the defendant intoxicated by reason of having an alcohol concentration of 0.08 or more, even if this was alleged in the charging instrument.

## CPJC 40.9 “Involuntary Intoxication” Defense Instruction

The Committee gave significant consideration to whether it should recommend an instruction on involuntary intoxication or some related bar to liability. It considered two possibilities but decided not to recommend instructions of either sort for intoxication offenses. For further discussion of the defense of involuntary intoxication, see chapter 26 of *Texas Criminal Pattern Jury Charges—Criminal Defenses*.

**“Insanity” by Involuntary Intoxication.** In *Torres v. State*, [585 S.W.2d 746](#), 749 (Tex. Crim. App. [Panel Op.] 1979), the court of criminal appeals held in effect that involuntary intoxication is a mental disease or defect that can trigger insanity under section 8.01 of the Texas Penal Code. Modified to accommodate post-1979 changes in the definition of “insanity,” *Torres* establishes generally that involuntary intoxication is an affirmative defense to criminal culpability when the defendant shows that (1) he exercised no independent judgment or volition in taking an intoxicant, and (2) as a result of the intoxication resulting from his taking the intoxicant, he did not know that his conduct was wrong. As the court recognized in *Mendenhall v. State*, [77 S.W.3d 815](#), 816 (Tex. Crim. App. 2002), this is the “affirmative defense of insanity due to involuntary intoxication.”

Later the same year as the *Torres* decision, the court suggested the involuntary intoxication “defense” recognized in *Torres* would apply in prosecutions under the intoxication offenses. See *Hardie v. State*, [588 S.W.2d 936](#), 939 (Tex. Crim. App. [Panel Op.] 1979).

*Hardie* was a prosecution for what was then involuntary manslaughter under [Tex. Penal Code § 19.05\(a\)\(2\)\(a\)](#). The offense was “by accident or mistake when operating a motor vehicle while intoxicated and, by reason of such intoxication, caus[ing] the death of an individual.” *Hardie*, [588 S.W.2d at 938](#). Rejecting *Hardie*’s claim that the trial court erred by failing to require the state to allege and prove that the intoxication was voluntary, the court explained:

Intoxication is an essential element of involuntary manslaughter under Section 19.05(a)(2). This provision does not require the State to allege and prove that the intoxication is voluntary. We note, however, that this Court has held that a defendant may raise the affirmative defense of involuntary intoxication. *Torres v. State*, [585 S.W.2d 746](#) (1979). If a defendant raises an affirmative defense, the defendant must prove it by a preponderance of the evidence. V.T.C.A. Penal Code, Section 2.04. The State is not required to negate the existence of an affirmative defense in the indictment. V.T.C.A. Penal Code, Section 2.04(b). The evidence in this case did not raise the issue of involuntary intoxication.

*Hardie*, [588 S.W.2d at 939](#). The *Torres* defense would apply, this suggests, if the facts supported it.

Despite *Hardie*'s hint that *Torres* would apply to what is now intoxication manslaughter, the courts of appeals have been unwilling to require in these cases that trial judges give instructions on insanity by involuntary intoxication.

Most have followed the approach of *Aliff v. State*, 955 S.W.2d 891, 892–93 (Tex. App.—El Paso 1997, no pet.), a prosecution for driving while intoxicated in which the defendant claimed his intoxication was involuntary because it was caused by prescription medication. Under *Beasley v. State*, 810 S.W.2d 838, 841 (Tex. App.—Fort Worth 1991, pet. ref'd), the court in *Aliff* reasoned, the *Torres* involuntary intoxication defense does not apply to driving while intoxicated and thus the trial court did not err in refusing *Aliff*'s request for a jury charge on involuntary intoxication. *Accord Otto v. State*, 141 S.W.3d 238, 241 (Tex. App.—San Antonio 2004) (“The offense of driving while intoxicated does not include as an element a culpable mental state. Therefore, the defense of involuntary intoxication is not relevant to the offense of driving while intoxicated.”) (citations omitted), *pet. granted*, 173 S.W.3d 70 (Tex. Crim. App. 2005) (per curiam); *Nelson v. State*, 149 S.W.3d 206, 210 (Tex. App.—Fort Worth 2004, no pet.); *Stamper v. State*, No. 05-02-01730-CR, 2003 WL 21540414 (Tex. App.—Dallas July 9, 2003, pet. ref'd) (not designated for publication); *Godby v. State*, No. 04-00-00334-CR, 2001 WL 752709 (Tex. App.—San Antonio July 5, 2001, no pet.) (not designated for publication); *Bearden v. State*, No. 01-97-00900-CR, 2000 WL 19638 (Tex. App.—Houston [1st Dist.] Jan. 13, 2000, pet. ref'd) (not designated for publication); *Smith v. State*, No. 03-97-00386-CR, 1998 WL 303880 (Tex. App.—Austin June 11, 1998, no pet.) (not designated for publication).

Some members of the Committee were not persuaded by the analyses of the courts of appeals. Insanity (and hence insanity by involuntary intoxication), they reasoned, is apparently not limited to those offenses that require a culpable mental state. These members of the Committee noted that in *Hardie* itself the court of criminal appeals indicated involuntary intoxication would be available as a defense despite its conclusion that the statute at issue imposed strict liability. They also believed that the circumstances under which some defendants become intoxicated justify exempting them from criminal responsibility and that the insanity by involuntary intoxication defense is the only available vehicle by which to provide for this.

The majority of the Committee, however, relied on the considerable authority that insanity by involuntary intoxication is not available in prosecutions for the strict liability intoxication offenses. The majority also was unconvinced that application of the insanity standard—not knowing the conduct was “wrong”—would serve to identify those defendants whose intoxication justified exonerating them from these offenses.

The Committee therefore decided not to recommend an instruction on insanity by involuntary intoxication for use in intoxication offense cases.

**Voluntary Act or “Automatism.”** Defendants charged with intoxication offenses have sometimes sought instructions that criminal responsibility might be barred by the

requirement set out in [Tex. Penal Code § 6.01\(a\)](#) that criminal liability be based on a voluntary act.

The year after *Hardie v. State*, the court of criminal appeals indicated that then-section 19.05(a)(2)(a) of the Penal Code, which covered what is now intoxication manslaughter, “requires the intoxication to be voluntary, thus satisfying the mandate of V.T.C.A. Penal Code, § 6.01 that conduct cannot be criminal unless it is voluntary.” See *Guerrero v. State*, [605 S.W.2d 262](#), 264 n.1 (Tex. Crim. App. 1980). This suggests that, independent of insanity by involuntary intoxication under *Torres*, [585 S.W.2d at 749](#), involuntary intoxication might bar conviction for certain intoxication offenses by establishing that the state has failed to prove under Code section 6.01 that the intoxication implicated in the offense was voluntary.

In one driving while intoxicated case, for example, the defendant testified that if he was intoxicated, he had not voluntarily drunk the substance that made him intoxicated. “This is a defense under section 6.01 of the penal code,” the court of appeals commented, and “[t]he trial court correctly charged the jury on this defense.” *Andrews v. State*, No. 05-96-00087-CR, 1998 WL 484610, at \*4 (Tex. App.—Dallas Aug. 19, 1998, no pet.) (not designated for publication).

There has been some confusion regarding the relationship between section 6.01(a)’s requirement and insanity by involuntary intoxication. *Stamper*, 2003 WL 21540414, at \*1 (defendant’s request for instruction on involuntary intoxication did not preserve any error in trial court’s refusal to give instruction on “the defense of an involuntary act”).

The distinction, however, was carefully drawn in *Nelson*, [149 S.W.3d 206](#), and instructions on the voluntary act requirement were held unnecessary.

Nelson sought instructions that “[a] person commits an offense only if he voluntarily engages in conduct, including . . . a bodily movement, whether voluntary or involuntary.” *Nelson*, [149 S.W.3d at 210](#). He also requested an instruction defining a “voluntary act” as a “conscious act.” By these requests, the court indicated, Nelson was attempting to raise what *Mendenhall*, [77 S.W.3d 815](#), described as the defense of “automatism” sometimes available under Code section 6.01. It continued:

Appellant . . . contends that his actual bodily movements—driving from work to home—were involuntary due to his intoxication.

Involuntary conduct is a defense to prosecution. See [Tex. Penal Code § 6.01](#). However, in Texas a claim of involuntary conduct is not available when the defendant voluntarily took the intoxicant. *Id.* § 8.04(a); see also *Torres*, [585 S.W.2d at 749](#) (holding that the defendant must have exercised no independent judgment in taking the intoxicant).

Nothing in the record indicates that appellant was acting involuntarily when he got into his car and drove home from work. In fact, appellant testi-

fied that he made the decision to drive home from work because he was in pain. He recalled making the trip home. . . . We see no evidence in the record to indicate that appellant was unconscious or acting involuntarily when he decided to get into his car and drive home from work.

. . . The fact that appellant took the prescription drugs voluntarily, knowing their effect, bars his claim of involuntary conduct. Accordingly, we hold that appellant was not entitled to a special jury instruction on automatism.

*Nelson*, 149 S.W.3d at 211–12 (citations omitted). *See also Peavey v. State*, 248 S.W.3d 455, 464–66 (Tex. App.—Austin 2008, pet. ref’d) (no error in refusing instruction on voluntary act or automatism in prosecution for felony driving a motor vehicle while intoxicated and evading arrest).

Some members of the Committee believed—as suggested by *Nelson*—that the intoxication offenses permitted at most a claim that the operation of a vehicle was “involuntary.” The requirement of intoxication, they reasoned, is essentially a “circumstance” element and need not itself be the consequence of conduct—voluntary or otherwise—by the defendant. Seldom or never, they concluded, would defendants be able to make viable cases that their operation of the vehicles was involuntary.

Some members of the Committee believed that if unconsciousness is caused by ingestion of intoxicating substances, this removes the situation from section 6.01(a). A defendant’s only possible defensive use can be involuntary intoxication under *Torres*, and that defense is unavailable under the authorities cited above.

The Committee as a whole decided that the applicability of the voluntary act requirement to the intoxication offenses was sufficiently in doubt that it should not recommend an instruction on involuntary conduct or automatism for use in intoxication cases.



## CPJC 40.10 Necessity Defense Instruction

**General Matters.** The instruction on necessity is based on the Committee’s general approach to defensive matters as described in chapter 1 of *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions*.

The necessity defense language is included in the instruction at CPJC 40.11 only. It could, of course, be modified for any of the other instructions to which the defense applies.

As “necessity” is defined in the Texas Penal Code, it has what might be called a third element: “a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.” [Tex. Penal Code § 9.22\(3\)](#).

The court of criminal appeals has indicated in dicta that this last aspect of the necessity standard is a matter of law that should not be submitted to the jury. *See Williams v. State*, [630 S.W.2d 640](#), 643 (Tex. Crim. App. 1982) (“The issue of a plain legislative purpose to exclude the justification is one of law, and the jury may not consider it.”). *Accord Pennington v. State*, [54 S.W.3d 852](#), 857 (Tex. App.—Fort Worth 2001, pet. ref’d) (“The requirements of [Penal Code] subsections 9.22(1) and (2) must be satisfied by evidence, while subsection (3) presents a question of law.”).

A defendant’s right to jury trial under the Sixth Amendment may require jury submission of what is technically an element of a substantive law defense to the charged offense. *Apprendi v. New Jersey*, [530 U.S. 466](#) (2000).

The Committee was of the view that whether a legislative purpose to exclude the justification offered plainly appears would best be treated as a matter of law for the court to determine. Even if as a purely theoretical matter a defendant has a right to jury submission of this matter, the Committee believed that no defendant would be harmed by failing to submit this to the jury. On the contrary, if the jury were instructed to address the matter, this could only harm a defendant. No possible harm can be done to criminal defendants by treating this as a matter of law to be decided by the judge. If the judge determines that the legislature has not plainly indicated a purpose to exclude the offered justification, defendants could be harmed only by in addition asking the jury to address in essence whether the defense applies to the type of case before it.

Consequently, at the expense of some trauma to the language of the statute, the Committee felt that the necessity defense instruction to be submitted to the jury should in fact have only two elements.

The Committee believed that a defendant’s Sixth Amendment right to jury trial would not be violated by this approach because jury submission of the final “element” of the defense could only harm the defendant.

Further discussion of the necessity defense may be found in *Texas Criminal Pattern Jury Charges—Criminal Defenses*, chapter 28.

**“Unanimity” Instruction on Necessity.** The instruction does not include a requirement that the jury be unanimous on the specific basis on which it finds against the defendant on the defense of necessity. It does require the jury to be unanimous in finding that the state has established that necessity does not apply. As explained in chapter 1 of *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions*, this is apparently current Texas law, although there is some uncertainty.

## II. Misdemeanor Driving While Intoxicated

### **CPJC 40.11** Instruction—Misdemeanor Driving While Intoxicated (with Necessity Defense)

#### INSTRUCTIONS OF THE COURT

##### **Accusation**

The state accuses the defendant of having committed the offense of driving while intoxicated. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., operated a motor vehicle in a public place while the defendant was intoxicated*]. The state has alleged intoxication by—

*[Include one or both of the following as applicable.]*

1. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body [; or/.]
2. having an alcohol concentration of 0.08 or more.

##### **Relevant Statutes**

A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place.

To prove that the defendant is guilty of driving while intoxicated, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant operated a motor vehicle; and
2. the defendant did this in a public place; and
3. the defendant did this while intoxicated.

*[Include the following if raised by the evidence.]*

If a person by the use of medication renders himself more susceptible to the influence of alcohol than he otherwise would have been and by reason thereof became intoxicated from recent use of alcohol, he would be in the same position as though his intoxication was produced by the use of alcohol alone.

*[Include the following if raised by the evidence.]*

[*Substance*] is a [controlled substance/drug/dangerous drug].

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of driving while intoxicated.

### **Definitions**

#### *Public Place*

“Public place” means any place to which the public or a substantial group of the public has access. The term includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

#### *Intoxicated*

“Intoxicated” means either (1) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or (2) having an alcohol concentration of 0.08 or more.

#### *Alcohol Concentration*

“Alcohol concentration” means the number of grams of alcohol per 210 liters of breath, 100 milliliters of blood, or 67 milliliters of urine.

#### *Motor Vehicle*

“Motor vehicle” means a device in, on, or by which a person or property is or may be transported or drawn on a highway, except a device used exclusively on stationary rails or tracks.

### **Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant operated a motor vehicle in [*county*] County, Texas, on or about [*date*]; and
2. the defendant did this in a public place; and
3. the defendant did this while intoxicated, by either—

- a. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or
- b. having an alcohol concentration of 0.08 or more.

You must all agree on elements 1, 2, and 3 listed above, but you do not have to agree on the method of intoxication listed in elements 3.a and 3.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

*[Select one of the following.]*

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant “guilty.”

*[or]*

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must next consider whether the defense of *[insert defense, e.g., necessity]* applies.

*[Include the following if raised by the evidence.]*

### **Necessity**

You have heard evidence that, when the defendant operated the motor vehicle in a public place, he believed that his conduct was necessary to avoid *[describe harm the defendant sought to avoid, such as the death of or serious bodily injury to someone]*.

### **Relevant Statutes**

A person’s conduct that would otherwise constitute the crime of driving while intoxicated is not a criminal offense if both—

1. the person reasonably believed the conduct was immediately necessary to avoid imminent harm, and
2. the desirability and urgency of avoiding the harm clearly outweighed, according to ordinary standards of reasonableness, the harm sought to be prevented by the law prohibiting the conduct.

## **Burden of Proof**

The defendant is not required to prove that necessity applies to this case. Rather, the state must prove, beyond a reasonable doubt, that the defendant did not act out of necessity.

## **Definition**

### *Reasonable Belief*

“Reasonable belief” means a belief that an ordinary and prudent person would have held in the same circumstances as the defendant.

## **Application of Law to Facts**

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant’s conduct was not justified by necessity.

To decide the issue of necessity, you must determine whether the state has proved, beyond a reasonable doubt, that either—

1. the defendant did not reasonably believe the conduct was immediately necessary to avoid an imminent harm, in this case [*describe harm the defendant sought to avoid, such as the death of or serious bodily injury to someone*]; or
2. the desirability and urgency of avoiding [*describe harm the defendant sought to avoid, such as the death of or serious bodily injury to someone*] did not clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law prohibiting driving while intoxicated.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of driving while intoxicated, and you believe, beyond a reasonable doubt, that the defendant did not act out of necessity, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

Driving while intoxicated is prohibited by and defined in [Tex. Penal Code § 49.04](#). The definition of “public place” is based on [Tex. Penal Code § 1.07\(a\)\(40\)](#). The definition of “intoxicated” is based on [Tex. Penal Code § 49.01\(2\)](#). The definition of “alcohol concentration” is based on [Tex. Penal Code § 49.01\(1\)](#). The defense of necessity is provided for in [Tex. Penal Code § 9.22](#). The definition of “reasonable belief” is based on [Tex. Penal Code § 1.07\(a\)\(42\)](#).

**Enhanced Misdemeanor Driving While Intoxicated.** Driving while intoxicated and similar chapter 49 offenses can be enhanced under [Tex. Penal Code § 49.09\(a\)](#) with proof of a prior conviction. The court of criminal appeals has held that an enhancement under this provision is a punishment-stage matter. *See Oliva v. State*, [548 S.W.3d 518](#) (Tex. Crim. App. 2018). Therefore, the jury should not be instructed on the enhancement in this charge.

**Necessity Defense Language.** The necessity defense language is included in this instruction only. It could, of course, be modified and incorporated into any of the other instructions to which the defense applies. See also the necessity defense comment at CPJC 40.10 and chapter 28 of *Texas Criminal Pattern Jury Charges—Criminal Defenses*.

### III. Other Related Offenses

#### **CPJC 40.12 Instruction—Driving While Intoxicated with Child Passenger**

#### **INSTRUCTIONS OF THE COURT**

##### **Accusation**

The state accuses the defendant of having committed the offense of driving while intoxicated with a child passenger. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., operated a motor vehicle in a public place while the defendant was intoxicated and the vehicle was occupied by a passenger younger than fifteen years of age*]. The state has alleged intoxication by—

*[Include one or both of the following as applicable.]*

1. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body [; or/.]
2. having an alcohol concentration of 0.08 or more.

##### **Relevant Statutes**

A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place with a child passenger.

To prove that the defendant is guilty of driving while intoxicated with a child passenger, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant operated a motor vehicle; and
2. the defendant did this in a public place; and
3. the defendant did this while intoxicated; and
4. the vehicle was occupied by a passenger who was younger than fifteen years of age.

*[Include the following if raised by the evidence.]*

If a person by the use of medication renders himself more susceptible to the influence of alcohol than he otherwise would have been and by reason thereof



became intoxicated from recent use of alcohol, he would be in the same position as though his intoxication was produced by the use of alcohol alone.

*[Include the following if raised by the evidence.]*

[*Substance*] is a [controlled substance/drug/dangerous drug].

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of driving while intoxicated with a child passenger.

### **Definitions**

#### *Public Place*

“Public place” means any place to which the public or a substantial group of the public has access. The term includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

#### *Intoxicated*

“Intoxicated” means either (1) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or (2) having an alcohol concentration of 0.08 or more.

#### *Alcohol Concentration*

“Alcohol concentration” means the number of grams of alcohol per 210 liters of breath, 100 milliliters of blood, or 67 milliliters of urine.

#### *Motor Vehicle*

“Motor vehicle” means a device in, on, or by which a person or property is or may be transported or drawn on a highway, except a device used exclusively on stationary rails or tracks.

### **Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant operated a motor vehicle in [county] County, Texas, on or about [date]; and
2. the defendant did this in a public place; and
3. the defendant did this while intoxicated, by either—
  - a. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or
  - b. having an alcohol concentration of 0.08 or more; and
4. the motor vehicle was occupied by a passenger who was younger than fifteen years of age on the date listed in element 1 above.

You must all agree on elements 1, 2, 3, and 4 listed above, but you do not have to agree on the method of intoxication listed in elements 3.a and 3.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

Driving while intoxicated with a child passenger is prohibited by and defined in [Tex. Penal Code § 49.045](#). The definition of “public place” is based on [Tex. Penal Code § 1.07\(a\)\(40\)](#). The definition of “intoxicated” is based on [Tex. Penal Code § 49.01\(2\)](#). The definition of “alcohol concentration” is based on [Tex. Penal Code § 49.01\(1\)](#).

**Necessity Defense Language.** The necessity defense language is included in the instruction at [CPJC 40.11](#) in this chapter only. It could, of course, be modified and incorporated into the above instruction if the defense applies. See also the necessity defense comment at [CPJC 40.10](#) and chapter 28 of *Texas Criminal Pattern Jury Charges—Criminal Defenses*.

**CPJC 40.13 Instruction—Misdemeanor Flying While Intoxicated****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of flying while intoxicated. Specifically, the accusation is that the defendant operated an aircraft while the defendant was intoxicated. The state has alleged intoxication by—

*[Include one or both of the following as applicable.]*

1. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body [; or/.]
2. having an alcohol concentration of 0.08 or more.

**Relevant Statutes**

A person commits an offense if the person is intoxicated while operating an aircraft.

To prove that the defendant is guilty of flying while intoxicated, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant operated an aircraft, and
2. the defendant did this while intoxicated.

*[Include the following if raised by the evidence.]*

If a person by the use of medication renders himself more susceptible to the influence of alcohol than he otherwise would have been and by reason thereof became intoxicated from recent use of alcohol, he would be in the same position as though his intoxication was produced by the use of alcohol alone.

*[Include the following if raised by the evidence.]*

[Substance] is a [controlled substance/drug/dangerous drug].

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of flying while intoxicated.

## Definitions

### *Intoxicated*

“Intoxicated” means either (1) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or (2) having an alcohol concentration of 0.08 or more.

### *Alcohol Concentration*

“Alcohol concentration” means the number of grams of alcohol per 210 liters of breath, 100 milliliters of blood, or 67 milliliters of urine.

### *Aircraft*

“Aircraft” means a device intended, used, or designed for flight in the air.

## Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant operated an aircraft in [*county*] County, Texas, on or about [*date*]; and
2. the defendant did this while intoxicated, by either—
  - a. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or
  - b. having an alcohol concentration of 0.08 or more.

You must all agree on elements 1 and 2 listed above, but you do not have to agree on the method of intoxication listed in elements 2.a and 2.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the two elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

Flying while intoxicated is prohibited by and defined in [Tex. Penal Code § 49.05](#). The definition of “intoxicated” is based on [Tex. Penal Code § 49.01\(2\)](#). The definition of “alcohol concentration” is based on [Tex. Penal Code § 49.01\(1\)](#).

**Definition of “Aircraft.”** No definition of “aircraft” is provided in the definition section of chapter 49 of the Texas Penal Code, relating to intoxication and alcoholic beverage offenses. Some members of the Committee believed that the term *aircraft* should be defined despite that absence. Thus, we have borrowed the definition from the Texas Transportation Code. See [Tex. Transp. Code § 21.001\(2\)](#).

**Enhanced Misdemeanor Flying While Intoxicated.** Driving while intoxicated and similar chapter 49 offenses can be enhanced under [Tex. Penal Code § 49.09\(a\)](#) with proof of a prior conviction.

As with an enhanced misdemeanor driving-while-intoxicated charge, an enhancement under this provision is likely a punishment-stage matter. See *Oliva v. State*, [548 S.W.3d 518](#) (Tex. Crim. App. 2018). Therefore, the jury should not be instructed on the enhancement in this charge.

**Necessity Defense Language.** The necessity defense language is included in the instruction at CPJC [40.11](#) in this chapter only. It could, of course, be modified and incorporated into the above instruction if the defense applies. See also the necessity defense comment at CPJC [40.10](#) and chapter 28 of *Texas Criminal Pattern Jury Charges—Criminal Defenses*.

**CPJC 40.14 Instruction—Misdemeanor Boating While Intoxicated****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of boating while intoxicated. Specifically, the accusation is that the defendant operated a watercraft while the defendant was intoxicated. The state has alleged intoxication by—

*[Include one or both of the following as applicable.]*

1. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body [; or/.]
2. having an alcohol concentration of 0.08 or more.

**Relevant Statutes**

A person commits an offense if the person is intoxicated while operating a watercraft.

To prove that the defendant is guilty of boating while intoxicated, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant operated a watercraft, and
2. the defendant did this while intoxicated.

*[Include the following if raised by the evidence.]*

If a person by the use of medication renders himself more susceptible to the influence of alcohol than he otherwise would have been and by reason thereof became intoxicated from recent use of alcohol, he would be in the same position as though his intoxication was produced by the use of alcohol alone.

*[Include the following if raised by the evidence.]*

[Substance] is a [controlled substance/drug/dangerous drug].

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of boating while intoxicated.

## Definitions

### *Intoxicated*

“Intoxicated” means either (1) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or (2) having an alcohol concentration of 0.08 or more.

### *Alcohol Concentration*

“Alcohol concentration” means the number of grams of alcohol per 210 liters of breath, 100 milliliters of blood, or 67 milliliters of urine.

### *Watercraft*

“Watercraft” means a vessel, one or more water skis, an aquaplane, or another device used for transportation or carrying a person on water, other than a device propelled only by the current of the water.

## Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant operated a watercraft in [*county*] County, Texas, on or about [*date*]; and
2. the defendant did this while intoxicated, by either—
  - a. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or
  - b. by having an alcohol concentration of 0.08 or more.

You must all agree on elements 1 and 2 listed above, but you do not have to agree on the method of intoxication listed in elements 2.a and 2.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

Boating while intoxicated is prohibited by and defined in [Tex. Penal Code § 49.06](#). The definition of “intoxicated” is based on [Tex. Penal Code § 49.01\(2\)](#). The definition of “alcohol concentration” is based on [Tex. Penal Code § 49.01\(1\)](#).

**Definition of “Watercraft.”** The definition of “watercraft” is based on [Tex. Penal Code § 49.01\(4\)](#). This definition does not appear to require that the watercraft have a motor. The legislature does not define the term *watercraft* in the Texas Parks and Wildlife Code. However, the term *motorboat* is used and defined at [Tex. Parks & Wild. Code § 31.003\(3\)](#), and the legislature chose not to limit the definition of the term *watercraft* in the Penal Code in a similar manner. The legislature does clearly exclude from the definition provided in Penal Code section 49.01(4) any “device propelled *only* by the current” (emphasis added). The Committee believes that this definition thus may include any vessel propelled by motor, wind, or human power, such as sailboats, canoes, rowboats, rafts, kayaks, skis attached to motorized vessels, and motorized jet skis.

The definition of “watercraft” also appears in the Texas Transportation Code, where it means “a vessel subject to registration under Chapter 31, Parks and Wildlife Code.” [Tex. Transp. Code § 683.001\(8\)](#). If the legislature intended to define “watercraft” in the same manner as in the Penal Code, the Committee believes it would have done so rather than providing the alternative and different definition contained in [Tex. Penal Code § 49.01\(4\)](#). The Committee could find no case law on this point. However, if the Transportation Code definition does control, prosecutions would be limited in at least two ways. First, boating while intoxicated charges could be brought only if the watercraft operated in “public water.” [Tex. Parks & Wild. Code § 31.004](#). Second, this Transportation Code definition appears to exempt all vessels registered in another state or country ([Tex. Parks & Wild. Code § 31.022\(a\)\(1\), \(2\)](#)) and “all canoes, kayaks, punts, rowboats, rubber rafts, or other vessels under 14 feet in length when paddled, poled, oared, or windblown” ([Tex. Parks & Wild. Code § 31.022\(c\)](#)).

**Enhanced Misdemeanor Boating While Intoxicated.** Driving while intoxicated and similar chapter 49 offenses can be enhanced under [Tex. Penal Code § 49.09\(a\)](#) with proof of a prior conviction.

As with an enhanced misdemeanor driving-while-intoxicated charge, an enhancement under this provision is likely a punishment-stage matter. *See Oliva v. State*, [548 S.W.3d 518](#) (Tex. Crim. App. 2018). Therefore, the jury should not be instructed on the enhancement in this charge.



**Necessity Defense Language.** The necessity defense language is included in the instruction at CPJC 40.11 in this chapter only. It could, of course, be modified and incorporated into the above instruction if the defense applies. See also the necessity defense comment at CPJC 40.10 and chapter 28 of *Texas Criminal Pattern Jury Charges—Criminal Defenses*.

## IV. Felony Enhanced Offenses

### CPJC 40.15 General Comments on Felony Enhanced Offenses

**Felony Enhanced Driving While Intoxicated.** There are five grades of the offense of driving while intoxicated. The differences among the grades depend on the number and type of prior convictions of the defendant and whether a victim is injured or killed. The offense of driving while intoxicated with no alleged prior intoxication-related offense is a class B misdemeanor, with a minimum term of confinement of seventy-two hours. [Tex. Penal Code § 49.04\(b\)](#). If the state can show at trial that the defendant had previously been convicted of an offense listed in section 49.09(a) and defined in section 49.09(c), the offense of driving while intoxicated is a class A misdemeanor, with a minimum term of confinement of thirty days. [Tex. Penal Code § 49.09\(a\), \(c\)](#). If the state can show at trial that the defendant had previously been convicted of intoxicated manslaughter or two intoxication-related offenses, the offense of driving while intoxicated is a felony of the third degree. [Tex. Penal Code § 49.09\(b\)\(1\), \(2\)](#). If the state can show at trial that the defendant “caused serious bodily injury to a peace officer, a firefighter, or emergency medical services personnel while in the actual discharge of an official duty,” the offense of driving while intoxicated is a felony of the second degree. [Tex. Penal Code § 49.09\(b–1\)](#). If the state can show at trial that the defendant caused the death of a peace officer, a firefighter, or emergency medical services personnel while in the actual discharge of an official duty, the offense of driving while intoxicated is a felony of the first degree. [Tex. Penal Code § 49.09\(b–2\)](#).

The court of criminal appeals has held that the prior offenses required for enhanced felony penalties under [Tex. Penal Code § 49.09\(b\)](#) “are elements of the offense of driving while intoxicated. They define the offense . . . and are admitted into evidence as part of the State’s proof of its case-in-chief during the guilt-innocence stage of the trial.” *Gibson v. State*, [995 S.W.2d 693](#), 696 (Tex. Crim. App. 1999) (holding that state could rely on two prior convictions arising out of single act of DWI to enhance DWI offense to felony). Thus, such prior convictions must be pleaded in the indictment and proved to the jury beyond a reasonable doubt.

**Stipulation to Enhancement Prior Conviction.** The defendant may offer to stipulate to the jurisdictional prior involuntary manslaughter conviction in a felony DWI case brought pursuant to [Tex. Penal Code § 49.09\(b\)\(1\)](#). It is the defendant’s responsibility to draft an acceptable written stipulation, signed by the defendant. The trial judge need not accept a stipulation that is not dispositive of the jurisdictional element. *Martin v. State*, [200 S.W.3d 635](#), 640 n.12 (Tex. Crim. App. 2006).

However, when the defendant agrees to stipulate to the requisite number or type of convictions necessary to enhance the penalty, the prosecutor may not read the full

indictment to the jury, nor may he present evidence of the convictions during the case-in-chief. The court of criminal appeals has held in two similar cases that this rule is necessary to strike a balance between Code of Criminal Procedure article 36.01(a)(1), which authorizes the reading of the full indictment, and rule 403 of the Texas Rules of Evidence, which prohibits the admission of evidence that is substantially more prejudicial than probative. In *Tamez v. State*, [11 S.W.3d 198](#) (Tex. Crim. App. 2000), the court of criminal appeals reversed a felony DWI conviction in which the state had read from the indictment each of the defendant's six prior DWI convictions at the beginning of the trial and entered the six judgments into evidence during its case-in-chief.

In cases where the defendant agrees to stipulate to the two previous DWI convictions, we find that the proper balance is struck when the state reads the indictment at the beginning of trial, mentioning only the two jurisdictional prior convictions, but is foreclosed from presenting evidence of the convictions during its case-in-chief. This allows the jury to be informed of the precise terms of the charge against the accused, thereby meeting the rationale for reading the indictment, without subjecting the defendant to substantially prejudicial and improper evidence during the guilt/innocence phase of trial. Following this logic, any prior convictions beyond the two jurisdictional elements should not be read or proven during the State's case-in-chief—as long as the defendant stipulates to the two prior convictions—as they are without probative value and can serve only to improperly prove the defendant's "bad character" and inflame the jury's prejudice.

*Tamez*, [11 S.W.3d at 202–03](#). See also *Robles v. State*, [85 S.W.3d 211](#) (Tex. Crim. App. 2002) (en banc) (when defendant stipulates to existence of the two alleged prior DWI convictions, state may read indictment but may not enter judgments into evidence, as jury could have gleaned from judgments that DWI charged was appellant's fifth alcohol-related offense and that appellant had not served his full term for his last prior conviction). These cases all concern instances in which the enhancement to a felony required two prior convictions. In a Penal Code section 49.09(b)(1) case, only a single prior intoxication manslaughter conviction is required. Nevertheless, the Committee believes that it could be sufficiently prejudicial to the defendant to provide the details of this prior death that the state must accept a stipulation under *Tamez* if such a proper stipulation is offered.

However, although no evidence relating to the particulars of the prior conviction is admissible at trial, the jury instruction must include the jurisdictional element of the crime charged even if this element is a prior conviction and the defendant has stipulated to its existence. The court of criminal appeals recently suggested that the best procedure is to include the allegation of the prior manslaughter conviction in the application paragraph of the jury instruction, with a separate paragraph stating that the defendant has stipulated to the existence of this prior conviction and thus that element has been satisfied. See *Martin*, [200 S.W.3d at 639](#).

**Instruction on Limited Use of Prior Conviction.** *Martin v. State* ensures that even if a defendant stipulates to the prior convictions, the jury at the guilt/innocence stage of the trial will at least be told something about these prior convictions. *See Martin*, 200 S.W.3d at 640–41. Those prior convictions, of course, cannot be used by the jury in determining whether the defendant operated a vehicle while intoxicated as alleged in the charged offense.

In *Martin*, the court of criminal appeals assumed that if the jury is told that the defendant stipulated to the prior convictions, the instruction conveying this information “would also instruct the jury to find that the jurisdictional prior convictions may not be used for any other purpose in determining the guilt of the defendant on the charged occasion.” *Martin*, 200 S.W.3d at 639.

The Committee concluded that such limiting instructions should be used in every case in which the jury hears evidence about, or is instructed concerning, such prior convictions.

**CPJC 40.16 Instruction—Felony Driving While Intoxicated (Two Prior DWI Convictions)****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the enhanced offense of driving while intoxicated. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., operated a motor vehicle in a public place while the defendant was intoxicated*]. Further, the accusation is that—

1. the defendant was convicted on [*date*], in Cause No. [*number*] in the [County/District] Court of [*county*] County, [*state*], for the offense of [*offense*]; and
2. the defendant was convicted on [*date*], in Cause No. [*number*] in the [County/District] Court of [*county*] County, [*state*], for the offense of [*offense*].

The state has alleged intoxication by—

*[Include one or both of the following as applicable.]*

1. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body [; or/.]
2. having an alcohol concentration of 0.08 or more.

**Relevant Statutes**

A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place and that person has previously been convicted two times of offenses relating to [*select one or more of the following: operating a motor vehicle while intoxicated/operating an aircraft while intoxicated/operating a watercraft while intoxicated/operating or assembling an amusement ride while intoxicated*].

To prove that the defendant is guilty of felony driving while intoxicated with two prior convictions, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant operated a motor vehicle; and
2. the defendant did this in a public place; and

3. the defendant did this while intoxicated; and
4. the defendant was previously convicted two times of offenses relating to [*select one or more of the following*: operating a motor vehicle while intoxicated/operating an aircraft while intoxicated/operating a watercraft while intoxicated/operating or assembling an amusement ride while intoxicated].

*[Include the following if raised by the evidence.]*

If a person by the use of medication renders himself more susceptible to the influence of alcohol than he otherwise would have been and by reason thereof became intoxicated from recent use of alcohol, he would be in the same position as though his intoxication was produced by the use of alcohol alone.

*[Include the following if raised by the evidence.]*

[*Substance*] is a [controlled substance/drug/dangerous drug].

*[Include the following if raised by the evidence.]*

[*Offense*] is an offense relating to [*select one or more of the following*: operating a motor vehicle while intoxicated/operating an aircraft while intoxicated/operating a watercraft while intoxicated/operating or assembling an amusement ride while intoxicated].

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of driving while intoxicated with two prior convictions.

### **Definitions**

#### *Public Place*

“Public place” means any place to which the public or a substantial group of the public has access. The term includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

#### *Intoxicated*

“Intoxicated” means either (1) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a

drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or (2) having an alcohol concentration of 0.08 or more.

#### *Alcohol Concentration*

“Alcohol concentration” means the number of grams of alcohol per 210 liters of breath, 100 milliliters of blood, or 67 milliliters of urine.

#### *Motor Vehicle*

“Motor vehicle” means a device in, on, or by which a person or property is or may be transported or drawn on a highway, except a device used exclusively on stationary rails or tracks.

*[Include the following if there is no stipulation to the prior convictions and therefore evidence concerning those convictions was introduced.]*

### **Evidence of Possible Prior Convictions of Defendant**

You have heard evidence that the defendant may have been convicted of prior offenses. This evidence may be considered by you only in determining whether the state has proved the fourth element of the offense charged, consisting of two prior convictions.

This evidence may not be used for any other purpose in determining the guilt or innocence of the defendant on this charge. For example, it may not be used to suggest that, because the defendant committed intoxication offenses in the past, he is more likely to have committed the presently charged intoxication offense.

### **Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant operated a motor vehicle in [county] County, Texas, on or about [date]; and
2. the defendant did this in a public place; and
3. the defendant did this while intoxicated, by either—
  - a. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a

drug, or a combination of two or more of those substances into the body; or

- b. having an alcohol concentration of 0.08 or more; and
4. the defendant was convicted both—
- a. on [date], in Cause No. [number] in the [County/District] Court of [county] County, [state], for the offense of [offense]; and
  - b. on [date], in Cause No. [number] in the [County/District] Court of [county] County, [state], for the offense of [offense].

*[If the defendant has stipulated to the prior convictions, insert the stipulation here and include the following.]*

The defendant has stipulated to the prior convictions, the fourth element of the offense charged. Because this element is uncontested, no evidence regarding the prior convictions is necessary. You are hereby directed to find that element 4 of this felony DWI offense is established.

These prior convictions may not be used for any other purpose in determining the guilt or innocence of the defendant on this charge. For example, they may not be used to suggest that, because the defendant committed intoxication offenses in the past, he is more likely to have committed the presently charged intoxication offense.

*[If the defendant has stipulated to the prior convictions, eliminate the option that includes element 4 from each of the following paragraphs.]*

You must all agree on elements [1, 2, and 3/1, 2, 3, and 4] listed above, but you do not have to agree on the method of intoxication listed in elements 3.a and 3.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements [1, 2, and 3/1, 2, 3, and 4] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the [three/four] elements listed above, you must find the defendant “guilty.”



*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

Enhancement of driving while intoxicated to a felony by proving two prior offenses is provided for in [Tex. Penal Code § 49.09\(b\)\(2\)](#). The definition of “public place” is based on [Tex. Penal Code § 1.07\(a\)\(40\)](#). The definition of “intoxicated” is based on [Tex. Penal Code § 49.01\(2\)](#). The definition of “alcohol concentration” is based on [Tex. Penal Code § 49.01\(1\)](#).

**Necessity Defense Language.** The necessity defense language is included in the instruction at CPJC 40.11 in this chapter only. It could, of course, be modified and incorporated into the above instruction if the defense applies. See also the necessity defense comment at CPJC 40.10 and chapter 28 of *Texas Criminal Pattern Jury Charges—Criminal Defenses*.

**CPJC 40.17 Instruction—Felony Driving While Intoxicated (Prior Intoxication Manslaughter Conviction)****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the enhanced offense of driving while intoxicated. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., operated a motor vehicle in a public place while the defendant was intoxicated*]. Further, the accusation is that the defendant was convicted on [*date*], in Cause No. [*number*] in the [County/District] Court of [*county*] County, [*state*], for the offense of [*offense*].

The state has alleged intoxication by—

*[Include one or both of the following as applicable.]*

1. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body [; or/.]
2. having an alcohol concentration of 0.08 or more.

**Relevant Statutes**

A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place and that person has previously been convicted one time of [an offense of intoxication manslaughter under Texas Penal Code section 49.08/an offense under the laws of another state if the offense contains elements that are substantially similar to the elements of intoxication manslaughter under Texas Penal Code section 49.08].

To prove that the defendant is guilty of felony driving while intoxicated with a prior conviction for intoxication manslaughter, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant operated a motor vehicle; and
2. the defendant did this in a public place; and
3. the defendant did this while intoxicated; and
4. the defendant was previously convicted one time of [an offense of intoxication manslaughter under Texas Penal Code section 49.08/an offense under the laws of another state if the offense contains elements that are sub-

stantially similar to the elements of intoxication manslaughter under Texas Penal Code section 49.08].

*[Include the following if the state relies on a prior conviction in another state.]*

[*Offense*] is an offense under the laws of another state that contains elements substantially similar to the elements of intoxication manslaughter under Texas Penal Code section 49.08.

*[Include the following if raised by the evidence.]*

If a person by the use of medication renders himself more susceptible to the influence of alcohol than he otherwise would have been and by reason thereof became intoxicated from recent use of alcohol, he would be in the same position as though his intoxication was produced by the use of alcohol alone.

*[Include the following if raised by the evidence.]*

[*Substance*] is a [controlled substance/drug/dangerous drug].

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of driving while intoxicated with a prior conviction.

### **Definitions**

#### *Public Place*

“Public place” means any place to which the public or a substantial group of the public has access. The term includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

#### *Intoxicated*

“Intoxicated” means either (1) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or (2) having an alcohol concentration of 0.08 or more.

*Alcohol Concentration*

“Alcohol concentration” means the number of grams of alcohol per 210 liters of breath, 100 milliliters of blood, or 67 milliliters of urine.

*Motor Vehicle*

“Motor vehicle” means a device in, on, or by which a person or property is or may be transported or drawn on a highway, except a device used exclusively on stationary rails or tracks.

*[Include the following if there is no stipulation to the prior conviction and therefore evidence concerning that conviction was introduced.]*

**Evidence of Possible Prior Conviction of Defendant**

You have heard evidence that the defendant may have been convicted of a prior offense. This evidence may be considered by you only in determining whether the state has proved the fourth element of the offense charged, consisting of a prior conviction.

This evidence may not be used for any other purpose in determining the guilt or innocence of the defendant on this charge. For example, it may not be used to suggest that, because the defendant committed an intoxication offense in the past, he is more likely to have committed the presently charged intoxication offense.

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant operated a motor vehicle in [*county*] County, Texas, on or about [*date*]; and
2. the defendant did this in a public place; and
3. the defendant did this while intoxicated, by either—
  - a. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or
  - b. having an alcohol concentration of 0.08 or more; and

4. the defendant was convicted on [date], in Cause No. [number] in the [County/District] Court of [county] County, [state], for the offense of [offense].

*[If the defendant has stipulated to the prior conviction,  
insert the stipulation here and include the following.]*

The defendant has stipulated to the prior manslaughter conviction, the fourth element of the offense charged. Because this element is uncontested, no evidence regarding the prior conviction is necessary. You are hereby directed to find that element 4 of this felony DWI offense is established.

This prior conviction may not be used for any other purpose in determining the guilt or innocence of the defendant on this charge. For example, it may not be used to suggest that, because the defendant committed this intoxication offense in the past, he is more likely to have committed the presently charged intoxication offense.

*[If the defendant has stipulated to the prior conviction,  
eliminate the option that includes element 4 from each of  
the following paragraphs.]*

You must all agree on elements [1, 2, and 3/1, 2, 3, and 4] listed above, but you do not have to agree on the method of intoxication listed in elements 3.a and 3.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements [1, 2, and 3/1, 2, 3, and 4] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the [three/four] elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

Enhancement of driving while intoxicated to a felony by proving a prior intoxication manslaughter conviction is provided for in [Tex. Penal Code § 49.09\(b\)\(1\)](#). Intoxication manslaughter is prohibited by and defined in [Tex. Penal Code § 49.08](#). The definition of “public place” is based on [Tex. Penal Code § 1.07\(a\)\(40\)](#). The definition

of “intoxicated” is based on [Tex. Penal Code § 49.01\(2\)](#). The definition of “alcohol concentration” is based on [Tex. Penal Code § 49.01\(1\)](#).

**Prior Conviction for Involuntary Manslaughter.** A prior conviction for involuntary manslaughter under former Texas Penal Code section 19.05(a)(2) may not be used to enhance a sentence under section 49.09(b)(1). *Ex parte Roemer*, [215 S.W.3d 887](#), 890 (Tex. Crim. App. 2007).

**Necessity Defense Language.** The necessity defense language is included in the instruction at CPJC [40.11](#) in this chapter only. It could, of course, be modified and incorporated into the above instruction if the defense applies. See also the necessity defense comment at CPJC [40.10](#) and chapter 28 of *Texas Criminal Pattern Jury Charges—Criminal Defenses*.

## V. Death or Injury Intoxication Offenses

### CPJC 40.18 General Comments—Causation

The language instructing the jury on causation in the intoxication manslaughter and intoxication assault instructions follows the approach outlined in chapter 1 of *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions* and part I in this chapter.

The language regarding causation does not contain a definition of a concurrent cause. Nor does it explain what is meant by several causes acting concurrently. Neither statutory nor case law provides sufficient guidance about how these matters could be defined.

As discussed in *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions*, the Committee encountered considerable difficulty with causation as a general matter. Two of the offenses addressed in this chapter—intoxication manslaughter and intoxication assault—required the Committee to struggle even more intensely with causation under Texas law.

Both of these offenses require proof that the accused, while engaging in certain specified activities, “by reason of [the defendant’s] intoxication causes” some harm to the victim. Intoxication assault requires that the harm be serious bodily injury, and intoxication manslaughter requires that it be death.

For several reasons, causation issues in prosecutions for these offenses arise more frequently and present difficult issues more often than with other offenses requiring proof of results.

The fact situations involved—automobile accidents—offer more opportunity for a defendant to argue that factors other than the defendant’s conduct contributed to the result. Further, in reality, the causal link to be proved is more complex than in most other cases: the state must prove that the defendant’s intoxication influenced or “caused” the defendant’s conduct and that this conduct then “caused” the result.

Additionally, in many other offenses requiring proof that the accused caused a result, the requirement of a culpable mental state narrows the scope of liability. Intoxication manslaughter and intoxication assault, in contrast, require no culpable mental state. Thus the requirement of causation becomes more attractive as a defense target.

There is considerable existing law on causation issues in prosecutions for these offenses, although almost all of that law is under intoxication manslaughter or its statutory predecessor.

Under the pre-1974 manslaughter law, the state was entitled to have the jury told that the state could prevail on proof that the defendant’s intoxication contributed to the victim’s death. The defendant was entitled to have the jury told that his intoxication

did not cause the victim's death as required by the crime if, although he was intoxicated, he behaved as he would have if he had been sober. *Long v. State*, 229 S.W.2d 366, 367 (Tex. Crim. App. 1950) (jury instructed "if you find and believe that under the same or similar circumstances a reasonable prudent person who was not intoxicated nor under the influence of intoxicating liquor could not have avoided the collision, or if you have a reasonable doubt thereof, you will find the defendant not guilty"); *Fox v. State*, 165 S.W.2d 733, 735 (Tex. Crim. App. 1942) (jury instructed "that [if] after seeing [the victim], in an effort to avoid striking him, the defendant thereafter operated his automobile in the same manner that it would have been operated by a person not intoxicated . . . then . . . it would be their duty to acquit the defendant, or if they had a reasonable doubt thereof to acquit him").

The 1974 Penal Code clearly changed this. Causation under the intoxication manslaughter statute is now controlled by the general causation provision, [Tex. Penal Code § 6.04\(a\)](#).

As a matter of substantive law, the state under the Penal Code still must prove not only that the defendant was intoxicated and while intoxicated caused the death of the victim but also that the intoxication caused the death of the victim. *Daniel v. State*, 577 S.W.2d 231, 233 (Tex. Crim. App. 1979) ("The death must be the result of the intoxication and proof must be made and submitted to the jury of that thing which worked a causal connection between the intoxication and the death." (quoting *Long*)). *Accord Hardie v. State*, 588 S.W.2d 936, 939 (Tex. Crim. App. [Panel Op.] 1979); *Garcia v. State*, 112 S.W.3d 839, 852–54 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

**Specifying Conduct of Defendant on Which State's Theory Is Based.** An initial problem in translating Texas Penal Code section 6.04(a) into an intoxication manslaughter or intoxication assault jury instruction is that section 6.04(a) is phrased in terms of the defendant's being responsible when the defendant's *conduct* is the cause of the result. Intoxication assault and intoxication manslaughter, however, require that the instruction address whether the accused's *intoxication*—a "condition," rather than conduct—had a sufficient impact on events to render the defendant responsible for the death. In reality, of course, what the law means is that an aspect of the defendant's conduct caused by his intoxication must have caused the result.

The Committee concluded that the instructions under current law should convey the substance of what was communicated to juries under prior law: if the defendant's conduct and the sequence of events would have been the same had the defendant not been intoxicated, the defendant did not by intoxication cause the death of or injury to the victim.

Section 6.04(a) indicates the instructions should refer to "the conduct of the [accused]." [Tex. Penal Code § 6.04\(a\)](#). The definitions of intoxication manslaughter (section 49.08) and intoxication assault (section 49.07) indicate that the instruction



should refer to the accused “by reason of [the defendant’s] intoxication causes” death or serious bodily injury. [Tex. Penal Code §§ 49.07, 49.08](#).

Consequently, the Committee drafted the instructions to focus on whether the result—death or serious bodily injury—was caused by the part or aspect of the accused’s conduct that was in turn caused or determined by the accused’s intoxication.

**Instructions If Concurrent Causation Not Raised.** If the facts of the case do not raise concurrent causation, a trial judge does not err (or at least does not *reversibly* err—the opinion is not clear) in giving an abstract instruction containing all of section 6.04(a)’s causation law, including that portion applying to concurrent causation. *Hughes v. State*, [897 S.W.2d 285](#), 297 (Tex. Crim. App. 1994). *See also McKinney v. State*, [177 S.W.3d 186](#), 201–02 (Tex. App.—Houston [1st Dist.] 2005), *aff’d after review on other grounds*, [207 S.W.3d 366](#) (Tex. Crim. App. 2006).

But at least sometimes a trial court errs by instructing the jury only in the abstract portion of the instruction that the state can meet its burden of persuasion by proving that the defendant’s intoxication contributed to the death of the victim. This is because that approach, permissible under pre-1974 law, is barred by section 6.04(a)’s explicit provision for concurrent causation. *Robbins v. State*, [717 S.W.2d 348](#), 350 (Tex. Crim. App. 1986) (trial court erred by telling jury abstract law required proof that defendant by reason of intoxication “caused or contributed to” death of victim).

It would seem to follow that a trial court errs under *Robbins* by telling the jury—in the terms of section 6.04(a)—that the defendant is responsible for the victim’s death or injury if that death or injury would not have occurred but for the defendant’s intoxication, “operating either alone or concurrently with another cause.” *Robbins*, [717 S.W.2d at 351](#). If the instruction mentions concurrent causation, *Robbins* holds, it must also make clear the limits on concurrent causation even if the facts do not raise concurrent causation.

*Robbins* assumed, first, that prior law required only that the intoxication-induced conduct of the defendant in some unqualified way contributed to causing the death or serious bodily injury. It assumed, second, that section 6.04(a)’s concurrent cause provisions imposed a minimal requirement regarding “the degree of contribution” the intoxication-induced conduct of the defendant must make to causing the death or serious bodily injury. Thus, whenever causation issues of any sort arise, juries should not be told that other factors or causes may also operate to cause the result without also being told about the concurrent causation law that defines for any of these situations the degree of contribution the defendant’s conduct must have made.

**Distinguishing Alternative Causation.** If the defendant’s argument is that the death or injury to the victim is attributable to something that is neither the defendant’s conduct specified by the state as the basis for its theory nor a concurrent cause, the argument must be “alternative” causation.

A defendant's contention that the events were influenced by his exhaustion but not his intoxication, *Robbins* held, does not raise concurrent causation. This is because "[a] concurrent cause is 'another cause' in addition to the actor's conduct, an 'agency in addition to the actor.'" *Robbins*, 717 S.W.2d at 351 n.2.

Apparently, however, a defendant can argue that he would have driven exactly as he did even if he was sober, and thus his intoxication is not a "but for" cause of the death or injury arising from the accident. It seems as though such a defendant can argue that his exhaustion is an alternative cause. This is not, however, to be reflected in the jury instruction, in either the abstract portion or the application portion.

**Determining Whether Concurrent Causation Is Raised.** In theory, concurrent causation is raised and a jury instruction on it is appropriate if the evidence would permit the jury to find all of the following:

1. The facts show something that can constitute a "concurrent cause."
2. The death or injury to the victim was caused by intoxication-induced conduct of the defendant and this concurrent cause was "operating . . . concurrently."
3. The concurrent cause was clearly sufficient to produce the death or injury to the victim.
4. The intoxication-induced conduct of the defendant was clearly insufficient to produce the death or injury to the victim.

The most difficult questions are how to decide elements 3 and 4. *Nugent v. State*, 749 S.W.2d 595, 596–97 (Tex. App.—Corpus Christi 1988, no pet.), provides an example. Nugent was operating a vehicle on Alameda Street in Corpus Christi, Texas, when it collided with another vehicle being operated by Marcus Meza. The Meza vehicle had been traveling in the opposite direction on Alameda and attempted a left-hand turn into a convenience store parking lot at the time of the wreck. Three passengers in the Meza vehicle were killed. There was evidence that Nugent was intoxicated and that he was driving at a speed considerably over the posted limit.

Nugent's intoxication could have affected his conduct in at least two ways: It could have caused him to speed. Or it could have so dulled his reflexes that he was unable to avoid the Meza vehicle when it turned in front of his car, although he would have been able to avoid it if he had been sober.

Clearly Nugent might have argued alternative causation—his conduct, insofar as it was induced or caused by intoxication, did not affect the events, which were caused only by Meza's left turn.

The court of appeals stated that "[t]here was . . . evidence from which the jury could conclude that Meza's conduct concurrently contributed to the wreck." *Nugent*, 749 S.W.2d at 597. Assuming that is correct, how should the trial judge determine whether the jury could find that Meza's conduct alone was clearly sufficient to cause the deaths? His left turn would not have caused the deaths had not some vehicle been

approaching in a manner that did not permit the driver to avoid Meza. If Nugent's intoxication caused him to speed and thus "but for" his intoxication he would not have been driving his vehicle at that particular spot, would this be sufficient?

How should the trial judge determine whether Nugent's intoxication-induced conduct was clearly insufficient to produce the deaths? His speeding and reduced reflexes would not have caused any harm to anyone had he not encountered some impediment to proceeding on the street.

The Committee was unable to discern from the numerous decisions any guidelines for making these difficult determinations. Nevertheless, trial judges must make them to determine, under present law, whether jury instructions should include coverage of concurrent causation.

**Instructing on Concurrent Causation When Such Instruction Is Required.** If the facts raise concurrent causation under section 6.04(a), a trial court must not only instruct on concurrent causation in the abstract but also apply that law to the facts. *Nugent*, 749 S.W.2d 595 (conviction for involuntary manslaughter reversed for failure to apply concurrent causation to facts).

In *Robbins*, the court of criminal appeals referred to the involuntary manslaughter instruction in the ninth edition of *Texas Criminal Forms and Trial Manual* as "a proper charge." See *Robbins*, 717 S.W.2d at 352 n.3. But this charge did not apply causation to the facts at all. What *Robbins* apparently meant was that the instruction properly set out causation law in the abstract. See 8 Michael J. McCormick et al., *Texas Practice Series: Criminal Forms and Trial Manual* § 93.11 (9th ed. 1985).

Concurrent causation under section 6.04(a), the Committee concluded, is "[a] ground of defense in a penal law that is not plainly labeled in accordance with [chapter 2 of the Penal Code]." *Tex. Penal Code* § 2.03(e). Thus, under Texas Penal Code section 2.03(d), (e), it is treated as a "defense," and "the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted." See *Tex. Penal Code* § 2.03(d), (e).

Pursuant to the general approach described in chapter 1 of *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions*, the Committee drafted the language instructing the jury on concurrent causation in the intoxication manslaughter and intoxication assault instructions in terms of what the state must prove as a procedural result of the defendant's having raised the issue.

Case law provides little in the way of examples of careful applications of concurrent causation to the facts of particular cases. *Nugent* is something of an exception. Defendant Nugent argued that he was relieved of responsibility for the death of the victim because Meza, the driver of the other car involved in the fatal collision, made a left turn into the path of the defendant's car and in doing so failed to yield the right of way to the defendant. The trial court instructed the jury on section 6.04(a) in abstract terms. Defense counsel unsuccessfully sought the following application instruction:

Therefore, in order to find the defendant guilty, you must believe beyond a reasonable doubt that the accident would not have occurred but for the intoxication of the defendant, if he was, operating either alone or concurrently with the conduct of Marcus Meza; and further, if you believe that Marcus Meza's conduct was clearly sufficient to cause the accident, and the defendant's intoxication was clearly insufficient to cause the accident, you must acquit the defendant.

*Nugent*, 749 S.W.2d at 597. The court of appeals apparently regarded this instruction as appropriate. *See Nugent*, 749 S.W.2d at 598. The Committee agreed and used it as the basis for its language instructing the jury on concurrent causation in the intoxication manslaughter and intoxication assault instructions.

The instructions that follow reflect the Committee's best efforts to explain how section 6.04(a)'s provisions should be applied to this unusually troublesome area. If in fact section 6.04(a)'s language was developed to address a very limited type of situation in causation law, applying it here across the board cannot be expected to provide satisfactory results.

**CPJC 40.19 Instruction—Intoxication Manslaughter****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of intoxication manslaughter. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., operated a motor vehicle in a public place while the defendant was intoxicated and by reason of that intoxication caused the death of another by accident or mistake*].

The state has alleged intoxication by—

*[Include one or both of the following as applicable.]*

1. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body [; or/.]
2. having an alcohol concentration of 0.08 or more.

**Relevant Statutes**

A person commits an offense if the person operates a motor vehicle in a public place, is intoxicated, and by reason of that intoxication causes the death of another by accident or mistake.

To prove that the defendant is guilty of intoxication manslaughter, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant operated a motor vehicle; and
2. the defendant did this in a public place; and
3. the defendant did this while intoxicated; and
4. by reason of the intoxication, the defendant caused the death of another by accident or mistake.

The requirement that the person have caused the death of another “by accident or mistake” means that the person need not have had criminal intent or any culpable mental state.

*[Include the following if raised by the evidence.]*

If a person by the use of medication renders himself more susceptible to the influence of alcohol than he otherwise would have been and by reason thereof became intoxicated from recent use of alcohol, he would be in the same position as though his intoxication was produced by the use of alcohol alone.

*[Include the following if raised by the evidence.]*

[Substance] is a [controlled substance/drug/dangerous drug].

*[Include the following if an instruction on causation is appropriate but no issue of concurrent causation is raised by the facts.]*

A person who is intoxicated causes the death of another by reason of that intoxication if the intoxication causes the person to engage in particular conduct and the death of the other would not have occurred but for the person's intoxication-influenced conduct.

*[Include the following if the facts raise an issue concerning concurrent causation.]*

A person who is intoxicated causes the death of another by reason of that intoxication if the intoxication causes the person to engage in particular conduct, and the death of the other would not have occurred but for the person's intoxication-influenced conduct operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the intoxication-influenced conduct of the person was clearly insufficient.

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of driving while intoxicated and causing the death of another by accident or mistake.

### **Definitions**

#### *Public Place*

"Public place" means any place to which the public or a substantial group of the public has access. The term includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

*Intoxicated*

“Intoxicated” means either (1) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or (2) having an alcohol concentration of 0.08 or more.

*Alcohol Concentration*

“Alcohol concentration” means the number of grams of alcohol per 210 liters of breath, 100 milliliters of blood, or 67 milliliters of urine.

*Motor Vehicle*

“Motor vehicle” means a device in, on, or by which a person or property is or may be transported or drawn on a highway, except a device used exclusively on stationary rails or tracks.

*[Include the following if raised by the facts.]*

*Death*

“Death” means the irreversible cessation of a person’s spontaneous respiratory and circulatory function, according to ordinary standards of medical practice. If artificial means of support preclude a determination whether a person’s spontaneous respiratory and circulatory functions have ceased, death means the irreversible cessation of all a person’s spontaneous brain functions, according to ordinary standards of medical practice.

*[Include if applicable.]*

*Person*

“Person” means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant operated a motor vehicle in [county] County, Texas, on or about [date]; and

2. the defendant did this in a public place; and
3. the defendant did this while intoxicated, by either—
  - a. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or
  - b. having an alcohol concentration of 0.08 or more; and
4. the defendant, by reason of the intoxication, caused the death of *[name of decedent]*.

*[Include the following if the jury was instructed in the relevant statutes unit on concurrent causation.]*

The defense asserts that the defendant is relieved of responsibility for the death of *[name of decedent]* because *[describe concurrent cause]* may have contributed to causing *[name of decedent]*'s death. Therefore, to determine that the defendant by reason of intoxication caused the death of *[name of decedent]*, you must find that either—

1. *[concurrent cause]* did not contribute to causing the death of *[name of decedent]*; or
2. *[concurrent cause]* contributed to causing the death of *[name of decedent]*, but *[concurrent cause]* was clearly insufficient to cause the death of *[name of decedent]*; or
3. *[concurrent cause]* contributed to causing the death of *[name of decedent]*, but the intoxication of the defendant was clearly sufficient to cause the death of *[name of decedent]*.

*[Continue with the following.]*

You must all agree on elements 1, 2, 3, and 4 listed above, but you do not have to agree on the method of intoxication listed in elements 3.a and 3.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”



*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

Intoxication manslaughter is prohibited by and defined in [Tex. Penal Code § 49.08](#). The causation instructions are based on [Tex. Penal Code § 6.04](#). The definition of “public place” is based on [Tex. Penal Code § 1.07\(a\)\(40\)](#). The definition of “intoxicated” is based on [Tex. Penal Code § 49.01\(2\)](#). The definition of “alcohol concentration” is based on [Tex. Penal Code § 49.01\(1\)](#). The definition of “person” is based on [Tex. Penal Code § 1.07\(a\)\(26\), \(38\)](#).

**Definition of “Death.”** The definition of “death” is based on the standard used to determine death as set out in the Texas Health and Safety Code. *See* [Tex. Health & Safety Code § 671.001\(a\), \(b\)](#). In *Grotti v. State*, [273 S.W.3d 273](#) (Tex. Crim. App. 2008), the court approved use of this definition in homicide cases.

**By Accident or Mistake.** The instruction, unlike general practice, defines or at least explains the statutory requirement that the death or injury be caused “by accident or mistake.” It provides that the requirement that the person have caused the death or injury of another “by accident or mistake” means that the person need not have had criminal intent or any culpable mental state. This clearly states the law, and it seems desirable to tell the jury what the statutory phrase means.

Under pre-1974 law, the court of criminal appeals explained:

[T]he terms “accident” and “mistake” . . . not having been defined in the statute . . . are there used in the sense ordinarily understood and mean “unintentional.” They are often used in conjunction with each other and interchangeably. The phrase “mistake or accident” is found [elsewhere in the statutes], and it seems that it has never been found necessary to further define the meaning of such phrase, the words composing the phrase being common and ordinary ones the meaning whereof being easily and readily understood.

*Johnson v. State*, [216 S.W.2d 573](#), 578 (Tex. Crim. App. 1949) (citation omitted). Under *Johnson*, a trial court’s failure to define the terms is not error. *Cave v. State*, [274 S.W.2d 839](#), 842 (Tex. Crim. App. 1955). *See also Caraway v. State*, [489 S.W.2d 106](#), 111 (Tex. Crim. App. 1973).

In fact, the terms add nothing to the state’s burden of proof but simply reflect what is *not* required. Perhaps the terms could be left out of the instruction. If they are left in, a brief explanation seems appropriate.

**Necessity Defense Language.** The necessity defense language is included in the instruction at CPJC 40.11 in this chapter only. It could, of course, be modified and incorporated into the above instruction if the defense applies. See also the necessity defense comment at CPJC 40.10 and chapter 28 of *Texas Criminal Pattern Jury Charges—Criminal Defenses*.

**CPJC 40.20 Instruction—Intoxication Assault****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of intoxication assault. Specifically, the accusation is that the defendant [*insert specific allegations, e.g.,* operated a motor vehicle in a public place while the defendant was intoxicated and by reason of that intoxication caused serious bodily injury to another by accident or mistake].

The state has alleged intoxication by—

*[Include one or both of the following as applicable.]*

1. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body [; or/.]
2. having an alcohol concentration of 0.08 or more.

**Relevant Statutes**

A person commits an offense if the person, by accident or mistake, while operating a motor vehicle in a public place while intoxicated, by reason of that intoxication causes serious bodily injury to another.

To prove that the defendant is guilty of intoxication assault, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant operated a motor vehicle; and
2. the defendant did this in a public place; and
3. the defendant did this while intoxicated; and
4. by reason of the intoxication, the defendant caused serious bodily injury to another by accident or mistake.

The requirement that the person have caused serious bodily injury to another “by accident or mistake” means that the person need not have had criminal intent or any culpable mental state.

*[Include the following if raised by the evidence.]*

If a person by the use of medication renders himself more susceptible to the influence of alcohol than he otherwise would have been and by reason thereof became intoxicated from recent use of alcohol, he would be in the same position as though his intoxication was produced by the use of alcohol alone.

*[Include the following if raised by the evidence.]*

[Substance] is a [controlled substance/drug/dangerous drug].

*[Include the following if an instruction on causation is appropriate but no issue of concurrent causation is raised by the facts.]*

A person who is intoxicated causes serious bodily injury to another by reason of that intoxication by accident or mistake if the intoxication causes the serious bodily injury of the other. Intoxication causes the serious bodily injury of another if that serious bodily injury would not have occurred but for the person's intoxication.

*[Include the following if the facts raise an issue concerning concurrent causation.]*

A person who is intoxicated causes serious bodily injury to another by reason of that intoxication if the serious bodily injury would not have occurred but for the intoxication, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the serious bodily injury and the intoxication of the person was clearly insufficient.

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of driving while intoxicated and causing serious bodily injury to another.

### **Definitions**

#### *Public Place*

“Public place” means any place to which the public or a substantial group of the public has access. The term includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

*Intoxicated*

“Intoxicated” means either (1) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or (2) having an alcohol concentration of 0.08 or more.

*Alcohol Concentration*

“Alcohol concentration” means the number of grams of alcohol per 210 liters of breath, 100 milliliters of blood, or 67 milliliters of urine.

*Motor Vehicle*

“Motor vehicle” means a device in, on, or by which a person or property is or may be transported or drawn on a highway, except a device used exclusively on stationary rails or tracks.

*Bodily Injury*

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

*Serious Bodily Injury*

“Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant operated a motor vehicle in [county] County, Texas, on or about [date]; and
2. the defendant did this in a public place; and
3. the defendant did this while intoxicated, by either—
  - a. not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or

- b. having an alcohol concentration of 0.08 or more; and
4. the defendant, by reason of the intoxication, caused serious bodily injury to [name of victim].

*[Include the following if the jury was instructed in the relevant statutes unit on concurrent causation.]*

The defense asserts that the defendant is relieved of responsibility for the serious bodily injury of [name of victim] because [describe concurrent cause] may have contributed to causing [name of victim]’s serious bodily injury. Therefore, to determine that the defendant by reason of intoxication caused the serious bodily injury of [name of victim], you must find that either—

1. [concurrent cause] did not contribute to causing the serious bodily injury of [name of victim]; or
2. [concurrent cause] contributed to causing the serious bodily injury of [name of victim], but [concurrent cause] was clearly insufficient to cause the serious bodily injury of [name of victim]; or
3. [concurrent cause] contributed to causing the serious bodily injury of [name of victim], but the intoxication of the defendant was clearly sufficient to cause the serious bodily injury of [name of victim].

*[Continue with the following.]*

You must all agree on elements 1, 2, 3, and 4 listed above, but you do not have to agree on the method of intoxication listed in elements 3.a and 3.b above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

## COMMENT

Intoxication assault is prohibited by and defined in [Tex. Penal Code § 49.07](#). The definition of “public place” is based on [Tex. Penal Code § 1.07\(a\)\(40\)](#). The definition of “intoxicated” is based on [Tex. Penal Code § 49.01\(2\)](#). The definition of “alcohol concentration” is based on [Tex. Penal Code § 49.01\(1\)](#). The definition of “bodily injury” is from [Tex. Penal Code § 1.07\(a\)\(8\)](#). The definition of “serious bodily injury” is from [Tex. Penal Code § 1.07\(a\)\(46\)](#).

**By Accident or Mistake.** The instruction, unlike general practice, defines or at least explains the statutory requirement that the death or injury be caused “by accident or mistake.” It provides that the requirement that the person have caused the death or injury of another “by accident or mistake” means that the person need not have had criminal intent or any culpable mental state. This clearly states the law, and it seems desirable to tell the jury what the statutory phrase means.

Under pre-1974 law, the court of criminal appeals explained:

[T]he terms “accident” and “mistake” . . . not having been defined in the statute . . . are there used in the sense ordinarily understood and mean “unintentional.” They are often used in conjunction with each other and interchangeably. The phrase “mistake or accident” is found [elsewhere in the statutes], and it seems that it has never been found necessary to further define the meaning of such phrase, the words composing the phrase being common and ordinary ones the meaning whereof being easily and readily understood.

*Johnson v. State*, [216 S.W.2d 573](#), 578 (Tex. Crim. App. 1949) (citation omitted). Under *Johnson*, a trial court’s failure to define the terms is not error. *Cave v. State*, [274 S.W.2d 839](#), 842 (Tex. Crim. App. 1955). See also *Caraway v. State*, [489 S.W.2d 106](#), 111 (Tex. Crim. App. 1973).

In fact, the terms add nothing to the state’s burden of proof but simply reflect what is *not* required. Perhaps the terms could be left out of the instruction. If they are left in, a brief explanation seems appropriate.

**Necessity Defense Language.** The necessity defense language is included in the instruction at CPJC [40.11](#) in this chapter only. It could, of course, be modified and incorporated into the above instruction if the defense applies. See also the necessity defense comment at CPJC [40.10](#) and chapter 28 of *Texas Criminal Pattern Jury Charges—Criminal Defenses*.

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## I. General Matters

### CPJC 41.1 Rationale for Included Instructions

Sections 481.115 through 481.118 and 481.121 of the Texas Health and Safety Code create offenses of possession of substances covered by the Texas Controlled Substances Act (Tex. Health & Safety Code tit. 6, subtit. C, ch. 481). The Code also distinguishes all the controlled substances possessory offenses by weight in grams of the substance, except for section 481.1151, which grades the offense according to “abuse units.” The Committee offers instructions for “basic” class B possession of marijuana and other marijuana possessory offenses. It also offers a general instruction that can be used for any of the basic possessory offenses except those created by section 481.1151.

The basic manufacture and delivery offenses are created by several sections of the Texas Controlled Substances Act that address substances by penalty groups: [Tex. Health & Safety Code § 481.112](#) (substances in Penalty Group 1), [§ 481.121](#) (group 1-A), [§ 481.113](#) (group 2), and [§ 481.114](#) (groups 3 and 4).

Because delivery is sufficiently distinguishable from manufacture, the Committee addressed delivery separately, drafting instructions that could be used in prosecutions for delivery of substances in all penalty groups except group 1-A (which uses abuse units rather than weight in grams).

Furthermore, under the statutory provisions, the definition of “delivery” includes offering to sell. The Committee concluded that there is too great a risk of confusion in attempting to explain to juries the inclusion of both transfer and offer to sell in the legislative concept of delivery. The Committee decided that delivery by offer to sell should instead be recognized as a matter distinct from delivery by transfer and that the two should be defined separately. The Committee therefore offers a separate instruction for each.

The Texas Controlled Substances Act offenses titled “Manufacture or Delivery” of specified controlled substances define the offenses as including possession of the substances with the intent to deliver them. Despite being thus joined with actual delivery, possession with intent to deliver is sufficiently different in content that, in the Committee’s view, it should be presented to juries as a separate offense. The Committee therefore also offers a separate instruction for possession with intent to deliver.

**CPJC 41.2 Weight Requirements and Grading of Offenses**

For many controlled substances offenses created by the Texas Controlled Substances Act (Tex. Health & Safety Code tit. 6, subtit. C, ch. 481), punishment grades are distinguished by the amount of substance by weight. For example, possession of marijuana under [Tex. Health & Safety Code § 481.121](#) is graded according to whether the amount possessed is two ounces or less; four ounces or less but more than two ounces; five pounds or less but more than four ounces; fifty pounds or less but more than five pounds; two thousand pounds or less but more than fifty pounds; or more than two thousand pounds.

Traditionally in Texas, jury submissions purport to require juries to find that the amount proved is within the specified range. Third-degree possession of marijuana, for example, requires proof that the amount possessed is more than five pounds *and* fifty pounds or less. Nevertheless, it is clear that a jury is expected to convict even if it finds the amount possessed is more than fifty pounds. Essentially the state—if it has proved possession of more than five pounds—is entitled to abandon that evidence showing more than fifty pounds.

The Committee concluded that this manner of instructing juries is unnecessarily complex and confusing. Consequently, the instructions in this chapter are drafted to state what in fact the jury must find the state has proved and no more. Third-degree possession, then, requires only that the jury find the defendant possessed marijuana weighing more than five pounds.

### CPJC 41.3 Culpable Mental State Concerning Nature of Substance

The Committee had some difficulty determining precisely what culpable mental states current law requires for the major controlled substances and related offenses.

**Current Practice.** With regard to possession and delivery of controlled substances generally, present practice is to tell the jury, in the abstract portion of the instruction, that the crime requires proof of at least knowingly possessing (or delivering) a controlled substance and that the substance alleged in the charging instrument, such as cocaine, is a controlled substance. This leaves unclear whether the culpable mental state of knowledge applies only to the statutory requirement that the substance be a controlled substance or also to the pleaded specificity that it be, for example, cocaine.

Application portions of current instructions generally tell juries they must find that a defendant knowingly possessed (or delivered) a specific controlled substance. This is also unclear. Perhaps, however, it suggests more strongly than the abstract instruction that the state must prove at least knowledge that the substance is what is alleged.

**Texas Case Law.** Appellate case law, in contrast to current practice, frequently suggests that all that is required is awareness that the substance is “contraband.” For example, in *Poindexter v. State*, 153 S.W.3d 402 (Tex. Crim. App. 2005), which involved a charge of possession of cocaine with intent to distribute, the court of criminal appeals explains, “[t]o prove unlawful possession of a controlled substance, the State must prove that: (1) the accused exercised control, management, or care over the substance; and (2) the accused knew the matter possessed was contraband.” *Poindexter*, 153 S.W.3d at 405 (citing *Joseph v. State*, 897 S.W.2d 374, 376 (Tex. Crim. App. 1995), and *Martin v. State*, 753 S.W.2d 384, 387 (Tex. Crim. App. 1988)). This or similar language appears in many opinions of the court of criminal appeals. *E.g.*, *King v. State*, 895 S.W.2d 701, 702–03 (Tex. Crim. App. 1995); *Martin*, 753 S.W.2d at 386.

The language was first used in *Ramos v. State*, 478 S.W.2d 102, 103 (Tex. Crim. App. 1972) (prosecution must show that defendant “knew that the object he possessed was contraband”), which involved a charge of possession of marijuana. The court in *Ramos* relied on its earlier decisions in *Rodriguez v. State*, 372 S.W.2d 541, 542 (Tex. Crim. App. 1963), and *Fawcett v. State*, 127 S.W.2d 905, 905 (Tex. Crim. App. 1939).

In neither *Ramos* itself nor later decisions repeating the *Ramos* language has the court of criminal appeals explained how that language relates to the terms of the statutes defining the offenses at issue. In fact, the statutes involved in the early cases, such as *Ramos*, *Rodriguez*, and *Fawcett*, appeared to contain no explicit culpable mental state at all. The court’s discussions concerned an apparently judicially created doctrine. In *Fawcett* the court characterized the matter under discussion as an “affirmative defense,” and in *Rodriguez* the court referred to it as a “defense” and “defensive theory.” Clearly the court was not addressing how juries should be instructed on an

expressly required culpable mental state element of the charged offense. *See Harris v. State*, 486 S.W.2d 88, 91–92 (Tex. Crim. App. 1972) (trial court did not err in refusing instruction on “knowledgeable possession” where evidence did not suggest lack of knowledge).

**Other Jurisdictions.** The Committee took into consideration that many and probably most other jurisdictions that have addressed similar matters have held that controlled substances offenses generally do not require awareness of the specific substance possessed. Culpable mental states are satisfied by proof that the accused knew (or believed) the substance was a controlled one. The rationale for this approach was well explained by an Idaho court:

The purpose of the intent element in the definition of a possession offense is to separate innocent, accidental, or inadvertent conduct from criminal behavior. Requiring knowledge of the specific type of controlled substance would not further this policy, for an individual’s mistake as to which controlled substance he possessed does not negate criminal intent. . . . Whether the defendant thinks . . . those drugs [he possesses] are methamphetamine or cocaine or heroin, he knows that he is engaged in conduct prohibited by our laws. An individual ought not escape punishment for possessing an illegal substance merely because he mistakenly believed (or claims to have believed) that it was a different illegal substance.

*State v. Stefani*, 132 P.3d 455, 461 (Idaho Ct. App. 2005) (citation omitted).

**Committee’s Approach—Controlled Substances Offenses Generally.** The Committee concluded that the language of the current statutes defining many controlled substances offenses could and should be construed as relatively consistent with the Texas courts’ long-standing assumption that most offenses require awareness only that the substance is contraband. Possession of a Penalty Group 1 controlled substance, prohibited by [Tex. Health & Safety Code § 481.115\(a\)](#), illustrates the Committee’s approach to the controlled substances offenses.

The section itself provides in operative part that “a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 1.” [Tex. Health & Safety Code § 481.115\(a\)](#). The required culpable mental state, the Committee believed, should be determined from the face of the statute itself. The specific controlled substance, such as cocaine, is of course not named in the statute.

The most appropriate reading of section 481.115(a), therefore, is that the defendant need not know more than that he is possessing something and that it is a controlled substance. The Committee concluded most controlled substances offenses should be construed in like manner.

The result would vary slightly from the *Ramos* language in that the defendant would have to be aware that the substance was a “controlled substance,” not simply “contra-

band.” If the evidence showed that the defendant possessed cocaine but mistakenly believed it was marijuana, he could not be convicted under the Committee’s formulation. The Committee, however, thought this was appropriate and most likely within the legislative intent reflected in the different treatment of marijuana and other offenses.

The Committee considered the suggestion that the culpable mental state should also apply to the requirement imposed by the final statutory language, “listed in Penalty Group 1.” Thus a defendant must be required to know (or believe) that the substance was one of those in Penalty Group 1. Such a requirement might make the seriousness of a defendant’s liability appropriately turn on his mental state. The Committee, however, rejected this for several reasons. First, the statutes are not drafted carefully enough to always result in a mistaken defendant’s liability being appropriately reduced. Second, such a requirement would dramatically increase the complexity of instructions, particularly if the defendant contended that the state’s proof showed him at most guilty of a lesser included offense. Third, the Committee failed to find any other jurisdiction that took this approach.

The instructions could, of course, go further than simply stating that the accused must be proved to have known the substance was a controlled substance. The Ninth Circuit pattern instructions, for example, define the element as requiring proof that “the defendant knowingly possessed [*specify controlled substance*].” They then, however, add, “It does not matter whether the defendant knew that the substance was [*specify controlled substance*]. It is sufficient that the defendant knew that it was some kind of a prohibited drug.” Ninth Circuit Jury Instructions Comm., *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* inst. 9.15 (2010 ed.), [http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal\\_Jury\\_Instructions\\_2015\\_12\\_0.pdf](http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Jury_Instructions_2015_12_0.pdf). The Committee was reluctant to recommend this elaboration, given the Texas courts’ concern with comments on the evidence.

An exceptional case might be presented in which a defendant comes forward with viable evidence that the defendant acted under a misperception regarding the nature of the substances involved and this misperception bears on the defendant’s apparent culpability. The Committee believed that any such cases could be addressed by creative application of mistake of fact under [Tex. Penal Code § 8.02](#) and possibly “transferred intent” under [Tex. Penal Code § 6.04\(b\)](#).

**Committee’s Approach—Marijuana Offenses.** The Committee also concluded, however, that the approach appropriate for most controlled substances offenses could not be taken regarding possession of marijuana under [Tex. Health & Safety Code § 481.121](#) (“a person commits an offense if the person knowingly or intentionally possesses a usable quantity of marihuana”) and delivery of marijuana under [Tex. Health & Safety Code § 481.120](#) (“a person commits an offense if the person knowingly or intentionally delivers marihuana”).

The only reasonable construction of the marijuana offense statutes, the Committee decided, was that the accused must be shown to have been at least aware that the substance was marijuana. *Ramos* and *Fawcett* were marijuana cases, and the language of both suggests a requirement of no more than awareness that the substance possessed was “contraband.” The Committee was convinced, however, that when the Texas courts address the current statutes relating to possession and delivery of marijuana, they will regard the early discussions superseded by today’s statutes.

The instructions in this chapter, then, vary in approach. Those concerning the basic marijuana offenses require knowledge that the substance is marijuana. The others require only knowledge that the substance is a controlled substance.

**CPJC 41.4 Culpable Mental State Concerning Weight of Substance**

Controlled substances offenses are often graded according to the weight of the substance involved in the offense. American courts almost always construe these offenses as not requiring awareness of the weight of the substance, even where that weight determines the seriousness of the offense.

The Committee was convinced that the Texas courts would follow the approach of American courts generally. This approach is also consistent with reading Texas culpable mental state law as requiring awareness of those elements of a crime that distinguish innocent from criminal behavior. The weight of the substance possessed does not distinguish innocent from criminal behavior but only distinguishes the seriousness with which the law regards clearly criminal behavior.

## II. Possessory Offenses

### CPJC 41.5 Culpable Mental State

Most controlled substances possessory offenses provide that a person commits the defined offenses only if the person acts “knowingly or intentionally.”

The possessory offenses are clearly “nature of conduct” offenses—the gravamen of the offenses is the conduct of possessing a substance. The state must also, however, prove a circumstance element—that the substance possessed is the controlled substance. The Committee believed that the required culpable mental state applies to both elements.

As chapter 1 of *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions* indicates, this presents a problem of applying the Texas Penal Code’s culpable mental state provisions. The definition of intent in section 6.03(a) of the Code contains no portion permitting its application to circumstance elements. Thus, the apparent statutory provision for establishing that the offense can be committed intentionally simply cannot be used employing the definitions provided in section 6.03.

The Committee concluded that the most reasonable response is simply to ignore the statutory provisions for the offenses to be committed intentionally. There is no reason for the state to plead this, because commission of the offense knowingly should be easier to prove. If the state does plead that the accused acted intentionally or knowingly, jury submission can be based on the state’s abandonment of the alternative allegation of intentional commission of the offense.

Defendants have no basis for complaint. There are no situations in which any reasonable interpretation of the statutes indicates a defendant is entitled to be charged with only “intentional” possession of an illegal substance.



## CPJC 41.6 Defining “Possession”

The Texas Penal Code and the Texas Health and Safety Code each contain a brief definition of “possession”: “‘Possession’ means actual care, custody, control, or management.” See [Tex. Penal Code § 1.07\(a\)\(39\)](#); [Tex. Health & Safety Code § 481.002\(38\)](#). In a prosecution for possession of a controlled substance, the jury should be instructed on at least this statutory definition of possession. See *Reed v. State*, [479 S.W.2d 47](#), 48 (Tex. Crim. App. 1972). The difficult question is what more, if anything, is permissible and desirable.

The question is difficult because much and perhaps all of the law in appellate discussions appears in a format that makes it inappropriate for incorporation into the instructions.

**Links Law.** In appellate considerations of the sufficiency of evidence to support convictions for possession of controlled substances, discussion has often been in terms of the “affirmative links” the state must prove between the accused and the substance.

In *Evans v. State*, [202 S.W.3d 158](#) (Tex. Crim. App. 2006), the court of criminal appeals observed that “the ‘affirmative links’ rule is not an independent test of legal sufficiency.” Rather, it is “a shorthand catch-phrase for a large variety of circumstantial evidence that may establish the knowing ‘possession’ or ‘control, management, or care’ of some item such as contraband.” The court added that the word *affirmative* lends nothing to the meaning and indicated that discussion would be in terms of only “links.” *Evans*, [202 S.W.3d at 162 n.9](#).

*Evans* summarized what should now be called “links law” as follows:

Regardless of whether the evidence is direct or circumstantial, it must establish that the defendant’s connection with the drug was more than fortuitous. . . . Mere presence at the location where drugs are found is thus insufficient, by itself, to establish actual care, custody, or control of those drugs. However, presence or proximity, when combined with other evidence, either direct or circumstantial (e.g., “links”), may well be sufficient to establish that element beyond a reasonable doubt. It is, as the court of appeals correctly noted, not the number of links that is dispositive, but rather the logical force of all of the evidence, direct and circumstantial.

*Evans*, [202 S.W.3d at 161–62](#) (footnotes omitted). See also *Allen v. State*, [249 S.W.3d 680](#), 704 (Tex. App.—Austin 2008, no pet.).

**Constructive Possession.** Some jurisdictions distinguish between “actual” possession and “constructive” possession. The Committee struggled with whether jury instructions in possession cases should communicate to juries that the state may prevail on proof of what many jurisdictions would term “constructive possession.”

Texas criminal law has long recognized the concept of constructive possession in a general sense. *E.g., Modica v. State*, 251 S.W. 1049, 1051 (Tex. Crim. App. 1923) (jury in theft prosecution instructed that “constructive possession was that possession which the law annexes to the legal title or ownership of property when there is a right to the immediate actual possession”).

The term *constructive possession* has occasionally been used in appellate discussions of possession of controlled substances. *Shortnacy v. State*, 474 S.W.2d 713, 716–17 (Tex. Crim. App. 1972) (“The crime of possession of narcotics requires a physical or constructive possession with actual knowledge of the presence of the narcotic substance.”) (quoting *State v. Carr*, 445 P.2d 857, 859 (Ariz. Ct. App. 1968)). In Texas law, however, what other jurisdictions call constructive possession is simply one aspect of links law:

[C]ontrol may be shown by actual or constructive possession, and knowledge being subjective, must always be inferred to some extent, in the absence of an admission by the accused. An affirmative link to the person accused with the possession of narcotics may be established by showing independent facts and circumstances which indicate the accused’s knowledge and control of the narcotics.

*McGoldrick v. State*, 682 S.W.2d 573, 578 (Tex. Crim. App. 1985) (quoting *Rodriquez v. State*, 496 S.W.2d 46 (Tex. Crim. App. 1973)).

There is, however, one mysterious case law reference to jury instructions on the term. In *Parasco v. State*, 323 S.W.2d 257 (Tex. Crim. App. 1959), the court of criminal appeals reversed on other grounds a conviction for possession of heroin. It then added, “We have concluded that the paragraph in the charge in which the court discusses constructive possession is, under the facts of this case, a charge on the weight of the evidence, and appellant’s objection thereto on such grounds should have been sustained.” *Parasco*, 323 S.W.2d at 259.

*Parasco* did not set out or discuss the disapproved instruction. The instruction *Parasco* disapproved was that “[a] person may be in constructive possession of an article or thing which is not physically present on his person, providing that he is in such juxtaposition of the article that he could exert dominion or control over the article at his will.” Brief for Appellant at 36, *Parasco v. State*, No. 30491 (Tex. Crim. App. Mar. 4, 1959).

**Joint Possession.** “Possession of a controlled substance need not be exclusive and evidence which shows that the accused jointly possessed the controlled substance with another is sufficient.” *Brooks v. State*, 529 S.W.2d 535, 537 (Tex. Crim. App. 1975) (citations omitted). In *Beltran De La Torre v. State*, \_\_\_ S.W.3d \_\_\_, No. PD-0561-18, 2019 WL 4458576, at \*5 (Tex. Crim. App. Sept. 18, 2019), the court of criminal appeals held that a jury instruction on joint possession, including the instruction “Two or more people can possess the same controlled substance at the same

time,” is an impermissible comment on the weight of the evidence. The court held that while the instruction was “substantively correct,” it was unnecessary to clarify the law. The jury charge in *Beltran De La Torre* included the statutory definition of “possession”—“Possession means actual care, custody, control, or management”—and this, the court held, adequately covered the applicable law because it encompassed the concept of joint possession and gave the parties a basis for arguing that concept to the jury. See [Tex. Health & Safety Code § 481.002](#)(38). Because it was already adequately covered, a nonstatutory instruction on joint possession would only draw the jury’s attention to evidence supporting the state’s argument that the defendant in that case possessed the drugs along with others. It highlighted one particular path to establishing the element of possession, and the state is not entitled to that emphasis. *Beltran De La Torre*, 2019 WL 4458576 at \*5. The court also concluded that a proposed instruction on mere presence constituted a comment on the weight of the evidence. *Beltran De La Torre*, 2019 WL 4458576 at \*7. Consequently, neither is included in the instructions that follow. But by agreement on the record, the parties and trial court could decide to include such instructions to clarify the law in a particular case. Instructions for that scenario are set out below.

**Mere Presence Instructions and Other Aspects of Links Law.** Case law discussions, particularly in more recent cases, characterize links law as inappropriate for jury instructions. *E.g.*, *Deener v. State*, [214 S.W.3d 522](#), 530 (Tex. App.—Dallas 2006, pet. ref’d) (“Because the affirmative-links rule is only a shorthand expression for evaluating the sufficiency of the evidence, instructing the jury on the affirmative-links rule would be improper.”). A frequently quoted analysis concluded, “Affirmative links, like the reasonable hypothesis theory, is a technical legal standard of review which is not meant for use by the jury and would only lead to confusion and distraction.” *Davila v. State*, [749 S.W.2d 611](#), 614 (Tex. App.—Corpus Christi–Edinburg 1988, pet. ref’d).

The Committee was convinced that case law prohibits placing into jury instructions what purports to be a comprehensive summary of links law.

At one time, instructions using limited portions of links law were permitted. In 1975, the court of criminal appeals held that the defendant in a prosecution for possession of marijuana was entitled to a charge on mere presence at the scene. See *McShane v. State*, [530 S.W.2d 307](#), 308 (Tex. Crim. App. 1975); see also *Musick v. State*, [862 S.W.2d 794](#), 798 (Tex. App.—El Paso 1993, pet. ref’d). But in 2019, the court of criminal appeals recognized that *McShane* had been undermined by *Giesberg v. State*, [984 S.W.2d 245](#), 250 (Tex. Crim. App. 1998), and was “no longer good law.” *Beltran De La Torre*, 2019 WL 4458576, at \*7 & n.6. *Beltran De La Torre* held that an instruction on joint possession and an instruction that “Mere presence at a place where narcotics are found is not enough to constitute possession” are both impermissible comments on the weight of the evidence because these concepts are already adequately covered by

jury instructions that include the statutory definition of “possession” and would only serve to emphasize one party’s theory. *Beltran De La Torre*, 2019 WL 4458576 at \*7.

The Committee concluded, of course, that jury instructions should include the statutory definition of possession. It also agreed that under existing law the instructions should neither mention nor attempt to define so-called constructive possession and should neither mention links law nor attempt a summary of it.

In light of *Beltran De La Torre*’s holding on joint possession and mere presence instructions, the Committee concluded that the court of criminal appeals would also find it an impermissible comment on the weight of the evidence to instruct the jury that mere knowledge of someone else’s possession does not constitute possession. Consequently, none of these statements of law are included in the instructions that follow. That said, the parties and trial court could agree to include such instructions if they believed it would help clarify the law in a given case and if such agreement were made on the record. For those situations, the Committee recommends the following formulations of joint-possession, mere-presence, and knowledge-of-another’s-possession instructions:

Two or more people can possess the same controlled substance at the same time.

If the evidence shows only that the defendant was at a place where the controlled substance was being possessed, that evidence alone is not enough to convict him.

If the evidence shows only that the defendant knew that someone else was in possession of the controlled substance, that evidence alone is not enough to convict him.

**CPJC 41.7 Texas Penal Code Section 6.01(b) and Voluntary Possession**

The controlled substances possessory offenses all raise a question about the effect of Texas Penal Code section 6.01(b). The section, in its entirety, provides as follows:

- (a) A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession.
- (b) Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.
- (c) A person who omits to perform an act does not commit an offense unless a law as defined by Section 1.07 provides that the omission is an offense or otherwise provides that he has a duty to perform the act.

[Tex. Penal Code § 6.01.](#)

Prevailing practice often appears to be simply to add the language of section 6.01(b) to the statutory definition of possession without any effort to relate or reconcile the two.

The Committee had considerable difficulty deciding what section 6.01(b) added to the statutory definition of possession. In part, this was because section 6.01 seems to combine a requirement of “conduct” and a demand that conduct be “voluntary.” The terms of the statute leave somewhat unclear whether section 6.01(b) addresses what is necessary for “possession” to constitute the “conduct” required or, rather, what is necessary for possession constituting conduct to be “voluntary.”

Some members of the Committee believed that section 6.01(b) has the effect of adding to the law’s definition of possession a requirement that the state’s proof of possession generally includes evidence that the defendant actively obtained or received the controlled substance. If instead the state’s evidence shows only passive control, the jury must find that this passive control lasted long enough for the accused’s omission—the failure to terminate control—to justify liability. *See Powell v. State*, 112 S.W.3d 642, 646 (Tex. App.—Houston [1st Dist.] 2003, pet. ref’d) (when evidence showed that defendant knowingly obtained or received shotgun he was charged with possessing, court need not reach whether proof showed he controlled shotgun long enough to terminate his control); *Holman v. State*, No. 01-04-00110-CR, 2005 WL 327205, at \*4 (Tex. App.—Houston [1st Dist.] Feb. 10, 2005, pet. ref’d) (not designated for publication) (applying *Powell* analysis in prosecution for possession of cocaine, so when “the evidence was legally and factually sufficient to show that [the defendant] knowingly obtained or received the cocaine, *i.e.*, that he knowingly exercised care, custody, control, or management over the cocaine,” court did not need to address whether state “showed that he had had control over the cocaine long enough to have terminated his control over it”).

Under this approach, jury instructions might include all or some of the following:

A defendant's possession of marijuana must be voluntary. Possession of marijuana is voluntary if—

1. the defendant was aware that he obtained or received the marijuana, or
2. the defendant had control of the marijuana and was aware of that control for a sufficient time to permit him to terminate the control.

Ultimately, however, a majority of the Committee concluded that section 6.01(b) was designed to address the limited situation in which the evidence shows that the defendant exercised the actual control required by the statutory definition of possession but also raises a question of whether that control was of sufficient duration to justify criminal liability.

The Committee therefore recommends that jury instructions on controlled substances possessory offenses include this provision only when the trial judge finds the evidence raises a question of whether the defendant's control, if it is proved, was for a long enough period. In those situations, the jury should be told that the control must have lasted for a sufficient time to enable the defendant to terminate the control. To avoid any risk that the confusing requirement is not adequately put to the jury, the instruction should also include the statement that the defendant must have been aware of the control. These requirements are phrased as ones of voluntariness because of the statutory provision and its terminology.

Then there is the question of whether to incorporate the language into the application portion of the instructions. The requirement could be regarded as simply part of the definition of the conduct required—possession—which would most likely not require incorporation into the application provision.

More likely, however, the requirement, phrased in the Texas Penal Code as one of “voluntary[iness],” is a “ground of defense in a penal law.” See [Tex. Penal Code § 2.03\(e\)](#). Further, it is one that is not plainly labeled as an exception, a defense, or an affirmative defense. Under [Tex. Penal Code § 2.03\(e\)](#), therefore, it is to be treated as a defense. Consequently, a jury instruction is appropriate only if evidence has been admitted that supports the ground of defense. See [Tex. Penal Code § 2.03\(c\)](#). If the jury is instructed on the matter, it must be told the state has the burden of proving voluntariness beyond a reasonable doubt. See *Alford v. State*, 866 S.W.2d 619, 624 n.8 (Tex. Crim. App. 1993).

If an instruction addresses “defensive issues,” the judge has an obligation to apply the abstract law to the facts. *Barrera v. State*, 982 S.W.2d 415, 416 (Tex. Crim. App. 1998). The substance of the requirement of voluntariness is considerably less complex than that of defenses, such as the defense of necessity incorporated into the instruction

at CPJC 40.11 in this volume. As a result, the Committee concluded that when voluntariness is raised, it can be adequately covered by adding it—in the application portion of the instructions—as a final element of the state’s case.

This defensive contention that otherwise-proved possession was not voluntary is provided for in the instruction at CPJC 41.8 for class B misdemeanor possession of marijuana. It could be raised in prosecutions for the other possessory offenses covered in this chapter, of course. If it is, it should be worked into the applicable offense instruction as it is worked into the marijuana instruction at CPJC 41.8.

**CPJC 41.8     Instruction—Possession of Marijuana—Class B  
Misdemeanor (with Voluntariness Requirement)**

**INSTRUCTIONS OF THE COURT**

**Accusation**

The state accuses the defendant of having committed the offense of possession of marijuana. Specifically, the accusation is that [*insert specific allegations, e.g., the defendant did intentionally or knowingly possess a usable quantity of marijuana of two ounces or less*].

**Relevant Statutes**

A person commits an offense if the person knowingly possesses a usable quantity of marijuana of two ounces or less.

To prove that the defendant is guilty of possession of marijuana, the state must prove, beyond a reasonable doubt, [three/four] elements. The elements are that—

1. the defendant possessed marijuana; and
2. the marijuana was of a usable quantity; and
3. the defendant knew he was possessing marijuana [./; and]

*[Include the following if raised by the evidence.]*

4. the defendant's possession of the marijuana was voluntary.

*[Include the following if raised by the evidence.]*

The state must prove that the defendant's possession of marijuana was voluntary. Possession of marijuana is voluntary if the defendant had control of the marijuana and was aware of that control for a sufficient time to permit him to terminate the control.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of possession of marijuana.



**Definitions***Possession*

“Possession” means actual care, custody, control, or management.

*Knew He Was Possessing Marijuana*

The phrase *knew he was possessing marijuana* means a person was aware that he was possessing something and that this something was marijuana.

*Marijuana*

“Marijuana” means the plant *Cannabis sativa* L., whether growing or not, the seeds of that plant, and every compound, manufacture, salt, derivative, mixture, or preparation of that plant or its seeds. The term *marijuana* does not include—

1. the resin extracted from a part of the plant or a compound, manufacture, salt, derivative, mixture, or preparation of the resin; or
2. the mature stalks of the plant or fiber produced from the stalks; or
3. oil or cake made from the seeds of the plant; or
4. a compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, fiber, oil, or cake; or
5. the sterilized seeds of the plant that are incapable of beginning germination; or
6. any part of the plant with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

**Application of Law to Facts**

You must decide whether the state has proved, beyond a reasonable doubt, [three/four] elements. The elements are that—

1. the defendant possessed marijuana in [county] County, Texas, on or about [date]; and
2. the marijuana was of a usable quantity; and
3. the defendant knew he was possessing marijuana [./; and]

*[Include the following if raised by the evidence.]*

4. the defendant’s possession of the marijuana was voluntary.

*[Continue with the following.]*

You must all agree on elements [1, 2, and 3/1, 2, 3, and 4] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements [1, 2, and 3/1, 2, 3, and 4] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved each of the [three/four] elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

Possession of marijuana is prohibited by and defined in [Tex. Health & Safety Code § 481.121](#). The definition of “marijuana” is derived from [Tex. Health & Safety Code § 481.002\(26\)](#) and [Tex. Agric. Code § 121.001](#). The definition of “possession” is from [Tex. Health & Safety Code § 481.002\(38\)](#) and [Tex. Penal Code § 1.07\(a\)\(39\)](#).

**Definition of “Usable Quantity.”** It is not error for a trial court to refuse to define usable quantity. *E.g., Holmes v. State*, [962 S.W.2d 663](#), 674 (Tex. App.—Waco 1998, pet. ref’d, untimely filed).

**Part of Plant Properly Considered in Determining Weight.** In determining the amount of marijuana possessed, the statutory definition permits the jury to include “the plant *Cannabis sativa* L., whether growing or not,” but not “the mature stalks of the plant” or hemp, among other things. [Tex. Health & Safety Code § 481.002\(26\)](#). In *Young v. State*, [922 S.W.2d 676](#) (Tex. App.—Beaumont 1996, pet. ref’d), the Beaumont court of appeals, relying on *Doggett v. State*, [530 S.W.2d 552](#), 555 (Tex. Crim. App. 1975), held that “it was the defendant’s burden at trial to present evidence of the weight of any materials excluded from the statutory definition of marijuana so as to show the weight alleged and/or proven by the State was incorrect.” *Young*, [922 S.W.2d at 677](#). The case does not address what, if anything, this requires of the jury instruction.

Apparently, it is sufficient if the jury instruction makes clear the weight that must be proved and the statutory definition of marijuana so that the jury can determine what—if any—part of the material relied on by the state should be excluded in determining whether the defendant possessed a specific quantity.

**Voluntariness Requirement Language.** The voluntariness requirement language is included in this instruction only. It could, of course, be modified and incorporated

into any of the other instructions to which the requirement applies. See also the voluntary possession comment at CPJC [41.7](#).

**CPJC 41.9 Instruction—Possession of Marijuana—Other Grades****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of possession of marijuana. Specifically, the accusation is that [*insert specific allegations, e.g., the defendant did intentionally or knowingly possess a usable quantity of marijuana of four ounces or less but more than two ounces*].

**Relevant Statutes**

A person commits an offense if the person knowingly possesses a usable quantity of marijuana of [*insert specific amount, e.g., four ounces or less but more than two ounces*].

To prove that the defendant is guilty of possession of marijuana, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant possessed marijuana; and
2. the marijuana was of a usable quantity; and
3. the marijuana weighed more than [*insert specific amount, e.g., two ounces*]; and
4. the defendant knew he was possessing marijuana.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of possession of marijuana.

**Definitions***Possession*

“Possession” means actual care, custody, control, or management.

*Knew He Was Possessing Marijuana*

The phrase *knew he was possessing marijuana* means a person was aware that he was possessing something and that this something was marijuana.

*Marijuana*

“Marijuana” means the plant *Cannabis sativa* L., whether growing or not, the seeds of that plant, and every compound, manufacture, salt, derivative, mixture, or preparation of that plant or its seeds. The term *marijuana* does not include—

1. the resin extracted from a part of the plant or a compound, manufacture, salt, derivative, mixture, or preparation of the resin; or
2. the mature stalks of the plant or fiber produced from the stalks; or
3. oil or cake made from the seeds of the plant; or
4. a compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, fiber, oil, or cake; or
5. the sterilized seeds of the plant that are incapable of beginning germination; or
6. any part of the plant with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

**Application of Law to Facts**

You must decide whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant possessed marijuana in [*county*] County, Texas, on or about [*date*]; and
2. the marijuana was of a usable quantity; and
3. the marijuana weighed more than [*amount*]; and
4. the defendant knew he was possessing marijuana.

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved each of the four elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

## COMMENT

Possession of marijuana is prohibited by and defined in [Tex. Health & Safety Code § 481.121](#). The definition of “marijuana” is derived from [Tex. Health & Safety Code § 481.002\(26\)](#) and [Tex. Agric. Code § 121.001](#). The definition of “possession” is from [Tex. Health & Safety Code § 481.002\(38\)](#) and [Tex. Penal Code § 1.07\(a\)\(39\)](#).

**Definition of “Usable Quantity.”** It is not error for a trial court to refuse to define usable quantity. *E.g., Holmes v. State*, [962 S.W.2d 663](#), 674 (Tex. App.—Waco 1998, pet. ref’d, untimely filed).

**Part of Plant Properly Considered in Determining Weight.** In determining the amount of marijuana possessed, the statutory definition permits the jury to include “the plant *Cannabis sativa* L., whether growing or not,” but not “the mature stalks of the plant” or hemp, among other things. [Tex. Health & Safety Code § 481.002\(26\)](#). In *Young v. State*, [922 S.W.2d 676](#) (Tex. App.—Beaumont 1996, pet. ref’d), the Beaumont court of appeals, relying on *Doggett v. State*, [530 S.W.2d 552](#), 555 (Tex. Crim. App. 1975), held that “it was the defendant’s burden at trial to present evidence of the weight of any materials excluded from the statutory definition of marijuana so as to show the weight alleged and/or proven by the State was incorrect.” *Young*, [922 S.W.2d at 677](#). The case does not address what, if anything, this requires of the jury instruction.

Apparently, it is sufficient if the jury instruction makes clear the weight that must be proved and the statutory definition of marijuana so that the jury can determine what—if any—part of the material relied on by the state should be excluded in determining whether the defendant possessed a specific quantity.

**Voluntariness Requirement Language.** The voluntariness requirement language is included in the instruction at CPJC 41.8 in this chapter only. It could, of course, be modified and incorporated into the above instruction if the issue of voluntariness is raised. See also the voluntary possession comment at CPJC 41.7.

If modifying this instruction to include the voluntariness requirement language, be certain to also incorporate, at the appropriate locations, the additional element the state must prove and to alter any supporting language (for example, changing “You must all agree on elements 1, 2, 3, and 4 listed above” to “You must all agree on elements 1, 2, 3, 4, and 5 listed above”).

**CPJC 41.10 Instruction—Possession of Controlled Substance****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of possession of a controlled substance. Specifically, the accusation is that [*insert specific allegations, e.g., the defendant did knowingly possess a controlled substance, namely, cocaine [in an amount by aggregate weight, including any adulterants or dilutants, of [insert specific amount, e.g., one gram or more but less than four grams]]]*].

**Relevant Statutes**

A person commits an offense if the person knowingly possesses a controlled substance [and the amount of the controlled substance is, by aggregate weight, including adulterants or dilutants, [*insert specific amount, e.g., one gram or more but less than four grams*]].

*[Include the following if the evidence does not raise a question concerning a mistaken belief by the defendant regarding the kind of substance.]*

[*Substance*] is a controlled substance.

*[Include the following if the evidence raises a question concerning the defendant's mistaken belief regarding the kind of substance.]*

[*Substance*] and [*substance*] are controlled substances.

*[Include the following if the offense does not require a minimum weight.]*

To prove that the defendant is guilty of possession of [*substance*], the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant possessed [*substance*]; and
2. the defendant knew he was possessing a controlled substance.

*[Include the following if the offense requires a minimum weight.]*

To prove that the defendant is guilty of possession of [*substance*], the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant possessed [*substance*]; and
2. the [*substance*] was, by aggregate weight, including adulterants or dilutants, [*insert specific amount, e.g., one gram*] or more; and
3. the defendant knew he was possessing a controlled substance.

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of possession of a controlled substance.

### **Definitions**

#### *Possession*

“Possession” means actual care, custody, control, or management.

#### *Knew He Was Possessing Controlled Substance*

The phrase *knew he was possessing a controlled substance* means a person was aware that he was possessing something and aware that what he was possessing was a substance that in fact was a controlled substance.

### **Application of Law to Facts**

*[Include the following if the offense does not require a minimum weight.]*

You must decide whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, [*name*], possessed [*substance*] in [*county*] County, Texas, on or about [*date*]; and
2. the defendant knew he was possessing a controlled substance.

*[Include the following if the offense requires a minimum weight.]*

You must decide whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, [*name*], possessed [*substance*] in [*county*] County, Texas, on or about [*date*]; and
2. the [*substance*] was, by aggregate weight, including adulterants or dilutants, [*amount*] gram[s] or more; and



3. the defendant knew he was possessing a controlled substance.

*[Continue with the following.]*

You must all agree on [both elements 1 and 2/elements 1, 2, and 3] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, [either or both of elements 1 and 2/one or more of elements 1, 2, and 3] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved [both of the two/each of the three] elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

#### COMMENT

Possession of a controlled substance in Penalty Group 1 is prohibited by and defined in [Tex. Health & Safety Code § 481.115](#). Possession of a controlled substance in Penalty Group 2 is prohibited by and defined in [Tex. Health & Safety Code § 481.116](#). Possession of a controlled substance in Penalty Group 3 is prohibited by and defined in [Tex. Health & Safety Code § 481.117](#). Possession of a controlled substance in Penalty Group 4 is prohibited by and defined in [Tex. Health & Safety Code § 481.118](#).

**Ultimate User Exemption.** The possessory offenses for controlled substances in penalty groups 1, 2, 3, and 4 provide that an offense is not committed if the substance is possessed pursuant to a valid prescription. [Tex. Health & Safety Code §§ 481.115, 481.116–.118](#). Section 481.062(a)(3) provides a similar defense—explicitly an “exception”—for “an ultimate user or a person in possession of a controlled substance under a lawful order of a practitioner or in lawful possession of the controlled substance if it is listed in Schedule V.” [Tex. Health & Safety Code § 481.062\(a\)\(3\)](#). “Practitioner” and “ultimate user” are defined in [Tex. Health & Safety Code § 481.002](#). But section 481.184(a) states that—

[t]he state is not required to negate an exemption or exception provided by this chapter in a complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this chapter. A person claiming the benefit of an exemption or exception has the burden of going forward with the evidence with respect to the exemption or exception.

[Tex. Health & Safety Code § 481.184\(a\)](#).

As a result, the jury instructions need not address these matters unless evidence has been produced supporting, and thus raising, the matter. *Wright v. State*, 981 S.W.2d 197, 200 (Tex. Crim. App. 1998) (“[A] person claiming the benefit of the ‘ultimate user’ exemption or defense has the burden of producing evidence that raises the defense. Once the defense is raised, the trial court must, if requested, instruct the jury that a reasonable doubt on the issue requires that the defendant be acquitted.”) (citations omitted); *Dudley v. State*, 58 S.W.3d 296, 301 (Tex. App.—Beaumont 2001, no pet.) (in trial for possession of cocaine under section 481.115(a), trial court not required to instruct jury to find that defendant did not have prescription unless defendant produced evidence raising matter).

**Identifying Controlled Substances.** The evidence may suggest that the defendant may have mistakenly believed the substance that he is charged with possessing was a different controlled substance than what in fact it was.

In this event, it is important that the instructions accurately inform the jury that both what the substance in fact was and the substance the defendant may have mistakenly believed was involved are controlled substances. This is necessary for the jury to apply the requirement that the state prove knowledge that the substance was a controlled substance.

**Voluntariness Requirement Language.** The voluntariness requirement language is included in the instruction at CPJC 41.8 in this chapter only. It could, of course, be modified and incorporated into the above instruction if the issue of voluntariness is raised. See also the voluntary possession comment at CPJC 41.7.

If modifying this instruction to include the voluntariness requirement language, be certain to also incorporate, at the appropriate locations, the additional element the state must prove and to alter any supporting language (for example, changing “You must all agree on elements 1, 2, and 3 listed above” to “You must all agree on elements 1, 2, 3, and 4 listed above”).

### **III. Delivery Offenses**

#### **CPJC 41.11 Culpable Mental State**

The basic delivery offenses, with the exception of delivery of marijuana, provide that the offense must be committed “knowingly.” Generally, then, these offenses do not pose the problem of applying intent to a circumstance element.

## CPJC 41.12 Delivery, Transfer, and Constructive Transfer

Jury submission of delivery cases is complicated by several related matters: the explicit statutory distinction between delivery by actual transfer and delivery by constructive transfer, the practice of identifying the recipient in the charging instrument, and the lack of statutory definitions of the two kinds of transfer.

Practice is for an indictment for delivery of a controlled substance to specify the name of the recipient. This is probably necessary. The evidence must therefore, of course, show the delivery to the specified recipient.

A charging instrument for delivery of a controlled substance must specify which of the statutory types of delivery—actual transfer, constructive transfer, or offer to sell—the state will rely on at trial. *See Ferguson v. State*, 622 S.W.2d 846, 851 (Tex. Crim. App. 1981).

The term *constructive transfer* should be defined in jury instructions. *See Whaley v. State*, 717 S.W.2d 26, 31 (Tex. Crim. App. 1986).

In 1987, Judge Clinton of the court of criminal appeals acknowledged certain difficulty in the area but blamed “a lack of comprehension of meaning of the terms ‘actual transfer’ and ‘constructive transfer’ on the part of some who draft charging instruments and prepare charges.” *Conaway v. State*, 738 S.W.2d 692, 697 (Tex. Crim. App. 1987) (Clinton, J., concurring). The tasks of comprehending these terms, applying them to specific pleadings and evidence, and then explaining this to juries remain, in the Committee’s view, difficult.

**Currently Used Constructive Transfer Instruction.** The jury instruction on constructive transfer now in wide use developed from several discussions by the court of criminal appeals on matters other than jury instructions.

In *Davila v. State*, 664 S.W.2d 722 (Tex. Crim. App. 1984), the court of criminal appeals read *Rasmussen v. State*, 608 S.W.2d 205 (Tex. Crim. App. 1980), as “interpret[ing] a constructive transfer to be the transfer of a controlled substance either belonging to the defendant or under his direct or indirect control, by some other person or manner at the instance or direction of the defendant.” *Davila*, 664 S.W.2d at 724. Before *Davila*, the court of criminal appeals read *Rasmussen* as recognizing at least two distinguishable types of constructive transfer:

[A] constructive transfer may take several forms: the actor may constructively transfer narcotics to the intended recipient by entrusting the narcotics to an associate or the postal service for the delivery to the recipient, or the actor may place the contraband in a particular location and then advise the recipient of this location so that the recipient can retrieve the narcotics. While other possible forms of constructive transfer can be postulated as a method of “delivery” the critical factor is that “prior to the delivery the substance involved was directly or indirectly under the defendant’s control.”

*Queen v. State*, 662 S.W.2d 338, 340–41 (Tex. Crim. App. 1983) (quoting *Rasmussen*, 608 S.W.2d at 210).

In *Daniels v. State*, 754 S.W.2d 214 (Tex. Crim. App. 1988), the court of criminal appeals read *Gonzalez v. State*, 588 S.W.2d 574, 577 (Tex. Crim. App. 1979), as holding “that constructive transfer requires the transferor at least be aware of the existence of the ultimate transferee before delivery.” *Daniels*, 754 S.W.2d at 221. The court added, “This does not mean that the transferor need know the identity of or be acquainted with the ultimate recipient.” *Daniels*, 754 S.W.2d at 221.

Delivery by either statutory method requires “transfer.” That term is not defined in the statutes. In *Thomas v. State*, 832 S.W.2d 47 (Tex. Crim. App. 1992), the court addressed the term and concluded, “It is clear to us that the term ‘transfer’ plainly requires a voluntary relinquishment of possession in favor of another.” *Thomas*, 832 S.W.2d at 51.

In 1986, the court of criminal appeals made clear that “‘constructive transfer’ has acquired a particular meaning.” *Whaley*, 717 S.W.2d at 31. The term should therefore be defined in jury instructions. A sufficient definition of the phrase, however, is all that is required. That definition need not be incorporated into the application portion of the instructions. *See Wilburn v. State*, No. 2-03-266-CR, 2005 WL 327160, at \*8 (Tex. App.—Fort Worth Feb. 10, 2005, pet. ref’d) (not designated for publication) (“‘[C]onstructive transfer’ is not an independent crime that requires that all elements composing the definition to be alleged in the application portion of the jury charge.”).

In apparent response to *Whaley*, trial courts incorporated into jury instructions definitions developed from *Gonzalez*, *Rasmussen*, *Davila*, and *Daniels*, although none of these cases involved efforts to define constructive transfer in jury instructions. *See Hernandez v. State*, 808 S.W.2d 536, 539 (Tex. App.—Waco 1991, no pet.). Often trial courts instruct juries as follows:

The term “constructive transfer” of a controlled substance, as used here, means the transfer of a controlled substance, either belonging to the person charged or under his direct or indirect control, by some other person or manner, at the instance or direction of the person charged. In order to establish a constructive transfer by the person charged to some other person, it must be shown that, prior to the alleged delivery, the transferor must have either direct or indirect control of the substance transferred and that the transferor knew of the existence of the transferee.

*Hart v. State*, 15 S.W.3d 117, 121 (Tex. App.—Texarkana 2000, pet. ref’d). Variations on this instruction continue to be used.

In one recent case, for example, the court noted, “The charge defined constructive transfer as ‘the transfer of a controlled substance either belonging to an individual or under his direct or indirect control by some other person at the instance or direction of the individual accused of such constructive transfer.’” *Frank v. State*, 265 S.W.3d 519,

522 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (commenting that instruction “omitted the requirement that the transferor know of the existence of the transferee before delivery”).

The instruction at CPJC 41.13 defines constructive transfer solely in terms of the first of the two types of constructive transfer distinguished in *Davila*. It does not attempt to provide a general definition of constructive transfer in which actual transfer to an intermediary is simply an example.

This instruction also suggests that the evidence must show a completed transfer to the named recipient.

***Sims v. State—Constructive Transfer Reconsidered.*** In 2003, the court of criminal appeals—in an evidence sufficiency case arising out of a nonjury trial—addressed constructive transfer in considerable detail. See *Sims v. State*, 117 S.W.3d 267 (Tex. Crim. App. 2003). The court reaffirmed that constructive transfer of controlled substances can be made in the second of the two ways distinguished in *Davila*—by placing the substances in a particular location for retrieval by an intended recipient.

*Sims* also made clear that the intended recipient need not actually obtain possession for a completed delivery by constructive transfer to occur. A constructive transfer is complete—a delivery occurs—if the defendant places a controlled substance in a specific place for retrieval by the intended recipient and instructs the recipient on that location. *Sims*, 117 S.W.3d at 277–78. A constructive transfer to a recipient using an intermediary is complete if the defendant places a controlled substance in the possession of the intermediary for the purpose of having the intermediary make actual delivery to the recipient. *Sims*, 117 S.W.3d at 271.

As conceptualized in *Sims*, constructive transfer is essentially an *attempted* actual delivery. It consists of certain action short of actual delivery to the recipient that is intended to result in later actual delivery to that recipient. The key to what action by the defendant is required is apparently in *Thomas*’s definition of transfer—the defendant must relinquish control.

In a sense, *Sims*’s definition of constructive transfer fills what might be regarded as a gap in the Texas definition of delivery, when compared to definitions used in many other jurisdictions. In many jurisdictions, delivery is defined as including “the actual, constructive, or *attempted* transfer” of a substance. Under *Sims*, what amount to certain attempts to actually transfer are defined as transfers and, thus, as deliveries under the concept of constructive transfers.

This does make somewhat difficult the task of relating the pleading to the proof and submission to the jury. Suppose the state’s theory is that the defendant committed the crime by actually transferring the substance to an intermediary intending that the intermediary actually transfer the substance to the recipient. This is probably alleged as a delivery to the recipient by constructive transfer, even though the offense as defined

does not require that the recipient ever receive the substance. The crime of constructive transfer to the recipient is completed by an actual transfer to the intermediary.

Nothing in *Sims* suggests that the previously accepted definition of actual transfer was incorrect. Judge Johnson commented in dissent that actual transfer does not require that the transferor place the item directly in the hands of the transferee. But, she added, it does appear to require “a simultaneous relinquishment of control by the transferor and assumption of control by the transferee.” *Sims*, 117 S.W.3d at 278 (Johnson, J., dissenting). This seems consistent with the *Sims* majority.

As the case law defines actual and constructive transfers, one chain of events may involve several deliveries, any of which could be the basis for prosecution. Suppose the defendant gives cocaine to an intermediary and the intermediary then gives it to the recipient. The defendant’s giving of the cocaine to the intermediary is a delivery by actual transfer to the intermediary. It is also a delivery by actual transfer to the recipient, if the intermediary is the recipient’s agent. The actual transfer to the intermediary may also be a constructive transfer to the recipient, if the defendant intends that the intermediary deliver it to the recipient. The defendant may also be responsible as a party for the intermediary’s actual transfer to the recipient.

The charging instrument need not reflect that the state will prove delivery by actual transfer by evidence that the actual transfer was made by someone other than the defendant for whose conduct the defendant is responsible as a “party.” See *Marable v. State*, 85 S.W.3d 287 (Tex. Crim. App. 2002). Whether the law of parties should be included in the jury instructions, then, is determined entirely by whether the evidence produced would permit the jury to convict on that theory.

*Sims*, of course, did not address how or even whether the content of constructive transfer as developed in that opinion should be explained to juries. But nothing in *Sims* suggests the court was repudiating *Whaley* and the need to instruct juries on constructive transfer. Further, an instruction that ignores *Sims*’s development of the law of constructive transfer would be incomplete and most likely inaccurate. Most basically, the instructions frequently used do not make clear that a delivery by constructive transfer can be complete even if the recipient never actually obtains the substance.

When a jury is given alternative ways to find that the defendant “delivered,” the jury is most likely not required to be unanimous regarding the specific way its members rely on in finding a defendant guilty. See *Rodriguez v. State*, 89 S.W.3d 699, 702 (Tex. App.—Houston [1st Dist.] 2002, pet. ref’d) (“Because section 481.002(8) provides that ‘delivery’ includes both constructive transfer and offer to sell, the jury need not agree on the method of delivery to convict appellant.”).

If the instructions include the law of parties, the defendant is entitled to have the abstract law applied to the facts. *Ruiz v. State*, 766 S.W.2d 324, 326 (Tex. App.—Houston [14th Dist.] 1989, no pet.). See generally *Campbell v. State*, 910 S.W.2d 475, 477 (Tex. Crim. App. 1995) (“[I]t is error for a trial judge to refer to the law of parties in

the abstract portion of the jury charge and not to apply that law or to refer to that law in the application paragraph of the jury charge.”).

**Definition of “Actual Transfer.”** The definition of actual transfer at CPJC 41.13 is based on the discussion by the court of criminal appeals in *Heberling v. State*, 834 S.W.2d 350 (Tex. Crim. App. 1992): “[A]n actual transfer or delivery, as commonly understood, contemplates the manual transfer of property from the transferor to the transferee or to the transferee’s agents or to someone identified in law with the transferee.” *Heberling*, 834 S.W.2d at 354 (emphasis omitted). See *Ex parte Perales*, 215 S.W.3d 418, 420 (Tex. Crim. App. 2007) (discussing case law explanations of actual transfer).

There may be some question about whether the definition should require that the transfer be “manual.” Some discussions treat this as significant. See *Conaway*, 738 S.W.2d at 697–98.

When the state does not seek conviction on the theory that an actual transfer to an intermediary was in law a delivery by actual transfer to the recipient because the intermediary was the recipient’s agent, there is no need to burden the definition with references to agents or persons “identified in law with the transferee.”

**Mutual Exclusivity of Actual and Constructive Transfers.** Discussions sometimes suggest that actual transfer and constructive transfer are in some sense mutually exclusive. See *Conaway*, 738 S.W.2d at 694 (plurality opinion of Teague, J.) (“As a matter of law, [actual transfer, constructive transfer, and offer to sell] are mutually exclusive ways in which delivery of a controlled substance might occur.”); *Tomlinson v. State*, No. 01-92-01243-CR, 1994 WL 149078, at \*1 (Tex. App.—Houston [1st Dist.] Apr. 21, 1994, no pet.) (not designated for publication).

In *Sims*, the court held that when the evidence supported a finding by the jury that the state proved a constructive transfer, “[t]hat the evidence also shows an actual transfer is of no consequence in this case.” *Sims*, 117 S.W.3d at 278. Does this reject the claim that the two kinds of transfer are mutually exclusive?

Suppose the state proves that the defendant gave cocaine to an intermediary intending for the intermediary to give it to the recipient and that the intermediary then gave it to the recipient. *Sims* makes clear that proof that the defendant gave the cocaine to the intermediary will support a finding of a constructive transfer to the recipient by the defendant. That the evidence also shows an actual transfer by the defendant to the intermediary is of no consequence when the state has alleged the crime consists of a constructive transfer to the recipient.

In this situation, the evidence might show that the intermediary made an actual transfer to the recipient and that the defendant is responsible for that transfer as a party to it. Thus the defendant might be guilty of actual transfer to the recipient (the defendant is a party to the intermediary’s actual transfer to the recipient) and constructive transfer to the recipient (the defendant made an actual transfer to the intermediary,



intending that the intermediary give the substance to the recipient). Each theory, however, requires proof of some facts that the other does not. Guilt of actual transfer is not based on precisely the same facts as guilt of constructive transfer.

Despite *Sims*, actual and constructive transfer are probably still mutually exclusive in the sense that precisely the same facts could not give rise to both actual and constructive transfer to the same recipient.

Suppose, for example, the evidence showed that the defendant and the recipient were seated at a table. The defendant pushed a substance onto the table and the recipient picked it up. This might be a constructive transfer—placing the substance in a location for retrieval by the recipient. Or it might be an actual transfer—the defendant never really gave up possession until the recipient picked up the substance. But it probably cannot be both.

Even in this example, the two theories would rely on somewhat different facts. The constructive transfer theory would not use the retrieval of the substance by the recipient, while that fact would be essential to the actual transfer theory.

**CPJC 41.13 Instruction—Delivery of Controlled Substance—  
By Actual or Constructive Transfer**

**INSTRUCTIONS OF THE COURT**

**Accusation**

The state accuses the defendant of having committed the offense of delivery of a controlled substance. Specifically, the accusation is that *[insert specific allegations, e.g., the defendant did knowingly deliver by actual transfer or constructive transfer a controlled substance, namely, cocaine [in an amount by aggregate weight, including any adulterants or dilutants, of [insert specific amount, e.g., one gram or more but less than four grams]] to [name of recipient]]*.

**Relevant Statutes**

A person commits an offense if the person knowingly delivers a controlled substance by actual transfer or constructive transfer [and the amount of the controlled substance is, by aggregate weight, including adulterants or dilutants, *[insert specific amount, e.g., one gram or more but less than four grams]]*.

*[Substance]* is a controlled substance.

*[Include the following if the offense does not require a minimum weight.]*

To prove that the defendant is guilty of delivery of *[substance]*, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant delivered *[substance]* by actual transfer or constructive transfer; and
2. the defendant knew he was delivering a controlled substance.

*[Include the following if the offense requires a minimum weight.]*

To prove that the defendant is guilty of delivery of *[substance]*, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant delivered *[substance]* by actual transfer or constructive transfer; and
2. the *[substance]* was, by aggregate weight, including adulterants or dilutants, *[insert specific amount, e.g., one gram]* or more; and

3. the defendant knew he was delivering a controlled substance.

*[Continue with the following.]*

A person delivers a controlled substance to another by actual transfer if the person has possession and control over the controlled substance and manually conveys that possession and control of the controlled substance to the other [or to an agent of that other person].

*[Include the following if the state's theory is delivery by an intermediary.]*

A person constructively transfers a controlled substance to another if the person actually transfers the controlled substance to someone intending that the controlled substance eventually be placed in the possession of a third person, the intended eventual recipient. The person must know of the existence of the intended eventual recipient. The person need not know the identity of that intended recipient and need not be acquainted with that intended recipient.

A constructive transfer of this sort is complete if the person actually transfers the controlled substance to another as part of the plan. The state need not show that the intended recipient obtained possession of the substance.

*[Include the following if the state's theory is constructive delivery by making the substance available to the transferee.]*

A person constructively transfers a controlled substance to another if the person gives up possession of the controlled substance as part of a plan for the other person to obtain possession. For example, a constructive transfer may be made by leaving the substance at a location and notifying the other person that the other person can obtain the substance by retrieving it at that location.

A constructive transfer of this sort is complete when the person gives up possession of the controlled substance pursuant to the plan. The state need not show that the intended recipient retrieved or otherwise obtained possession of the controlled substance.

*[Include the following if the state's theory does not fit into either of the above categories.]*

Delivery of a controlled substance to another person by constructive transfer is a relinquishment of control over the controlled substance for the purpose and with the intent that the other person get control over the substance. It does not require that the other person actually get control. The defendant must be aware

of the intended recipient and intend to have that person receive control of the substance.

To prove that a defendant delivered a controlled substance to another by constructive transfer, the state must prove, beyond a reasonable doubt, that—

1. the defendant had either direct or indirect control of the substance; and
2. the defendant relinquished that control; and
3. the defendant did this with intent to convey control of the substance to the other person.

The defendant must be aware of the existence of the intended recipient. The defendant need not, however, know the identity of that intended recipient or be acquainted with that intended recipient.

A delivery by constructive transfer does not require that the intended recipient actually obtain control of the substance. The delivery is complete when the defendant relinquishes control with the required intent.

Delivery by constructive transfer can occur, among other ways, if—

1. the defendant leaves the substance in a location and notifies the intended recipient that the intended recipient can obtain the substance at that location; or
2. the defendant [delivers/actually transfers] the substance to an intermediary, intending that the intermediary [deliver/actually transfer] the substance to the intended recipient.

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of delivery of a controlled substance.

### **Definitions**

#### *Adulterant or Dilutant*

“Adulterant or dilutant” means any material that increases the bulk or quantity of a controlled substance, regardless of its effect on the chemical activity of the controlled substance.

*Deliver*

“Deliver” means to transfer, actually or constructively, to another [regardless of any agency relationship between the other person and any other individual].

*Knew He Was Delivering Controlled Substance*

The phrase *knew he was delivering a controlled substance* means a person was aware that he was delivering something and aware that what was being delivered was a substance that in fact was a controlled substance.

**Application of Law to Facts**

*[Include the following if the offense does not require a minimum weight.]*

You must decide whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, [name of defendant], delivered [substance] to [name of recipient] by actual transfer or by constructive transfer, as defined above, in [county] County, Texas, on or about [date]; and
2. the defendant knew he was delivering a controlled substance.

*[Include the following if the offense requires a minimum weight.]*

You must decide whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, [name of defendant], delivered [substance] to [name of recipient] by actual transfer or by constructive transfer, as defined above, in [county] County, Texas, on or about [date]; and
2. the [substance] was, by aggregate weight, including adulterants or dilutants, [amount] gram[s] or more; and
3. the defendant knew he was delivering a controlled substance.

*[Continue with the following.]*

You must all agree on [both elements 1 and 2/elements 1, 2, and 3] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, [either or both of elements 1 and 2/one or more of elements 1, 2, and 3] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved [both of the two/each of the three] elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

Delivery of a controlled substance in Penalty Group 1 is prohibited by and defined in [Tex. Health & Safety Code § 481.112](#). Delivery of a controlled substance in Penalty Group 2 is prohibited by and defined in [Tex. Health & Safety Code § 481.113](#). Delivery of a controlled substance in Penalty Group 3 or 4 is prohibited by and defined in [Tex. Health & Safety Code § 481.114](#). The definition of “deliver” is based on [Tex. Health & Safety Code § 481.002\(8\)](#). The definition of “adulterant or dilutant” is based on [Tex. Health & Safety Code § 481.002\(49\)](#).

**Voluntariness Requirement Language.** The voluntariness requirement language is included in the instruction at CPJC 41.8 in this chapter only. It could, of course, be modified and incorporated into the above instruction if the issue of voluntariness is raised. See also the voluntary possession comment at CPJC 41.7.

If modifying this instruction to include the voluntariness requirement language, be certain to also incorporate, at the appropriate locations, the additional element the state must prove and to alter any supporting language (for example, changing “You must all agree on elements 1, 2, and 3 listed above” to “You must all agree on elements 1, 2, 3, and 4 listed above”).

**CPJC 41.14 Instruction—Delivery of Controlled Substance—  
By Offer to Sell**

**INSTRUCTIONS OF THE COURT**

**Accusation**

The state accuses the defendant of having committed the offense of offering to sell a controlled substance. Specifically, the accusation is that [*insert specific allegations, e.g., the defendant did knowingly deliver by offering to sell a controlled substance, namely, cocaine [in an amount by aggregate weight, including any adulterants or dilutants, of [insert specific amount, e.g., one gram or more but less than four grams]] to [name of recipient]*].

**Relevant Statutes**

A person commits an offense if the person knowingly offers to sell a controlled substance [and the amount of the controlled substance is, by aggregate weight, including adulterants or dilutants, [*insert specific amount, e.g., one gram or more but less than four grams*]].

[*Substance*] is a controlled substance.

[*Include the following if the offense does not require a minimum weight.*]

To prove that the defendant is guilty of offering to sell [*substance*], the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant offered to sell [*substance*]; and
2. the defendant knowingly offered to sell a controlled substance.

[*Include the following if the offense requires a minimum weight.*]

To prove that the defendant is guilty of offering to sell [*substance*], the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant offered to sell [*substance*]; and
2. the offer was to sell [*substance*], by aggregate weight, including adulterants or dilutants, of [*insert specific amount, e.g., one gram*] or more; and
3. the defendant knowingly offered to sell a controlled substance.

*[Continue with the following.]*

Offering to sell [*substance*] does not require the state to prove that any particular substance was involved in the events. It does not require the state to prove that any substance shown to have been involved was in fact [*substance*]. The crime consists of an offer to sell a substance described in the offer as [*substance*].

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of offering to sell a controlled substance.

### **Definitions**

#### *Knowingly Offering to Sell Controlled Substance*

The phrase *knowingly offering to sell a controlled substance* means a person is aware that he is offering to sell something and aware that what is being offered for sale is a substance that in fact is a controlled substance.

#### *Adulterant or Dilutant*

“Adulterant or dilutant” means any material that increases the bulk or quantity of a controlled substance, regardless of its effect on the chemical activity of the controlled substance.

### **Corroboration**

Proof of an offer to sell must be corroborated by either—

1. a person other than the person to whom the offer is made, or
2. evidence other than a statement of the person to whom the offer is made.

If you conclude that the proof of an offer to sell has not been corroborated in either of these ways, you must return a verdict of “not guilty.”

### **Application of Law to Facts**

*[Include the following if the offense does not require a minimum weight.]*

You must decide whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—



1. the defendant, *[name of defendant]*, offered to sell *[substance]* to *[name of recipient]* in *[county]* County, Texas, on or about *[date]*; and
2. the defendant knowingly offered to sell a controlled substance.

*[Include the following if the offense requires a minimum weight.]*

You must decide whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, *[name of defendant]*, offered to sell *[substance]* to *[name of recipient]* in *[county]* County, Texas, on or about *[date]*; and
2. the defendant offered to sell *[substance]* that was, by aggregate weight, including adulterants or dilutants, *[amount]* gram[s] or more; and
3. the defendant knowingly offered to sell a controlled substance.

*[Continue with the following.]*

You must all agree on [both elements 1 and 2/elements 1, 2, and 3] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, [either or both of elements 1 and 2/one or more of elements 1, 2, and 3] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved [both of the two/each of the three] elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

Delivery of a controlled substance in Penalty Group 1 is prohibited by and defined in [Tex. Health & Safety Code § 481.112](#). Delivery of a controlled substance in Penalty Group 2 is prohibited by and defined in [Tex. Health & Safety Code § 481.113](#). Delivery of a controlled substance in Penalty Group 3 or 4 is prohibited by and defined in [Tex. Health & Safety Code § 481.114](#). “Deliver” is defined in [Tex. Health & Safety Code § 481.002\(8\)](#) to include “offering to sell a controlled substance.” The definition of “adulterant or dilutant” is based on [Tex. Health & Safety Code § 481.002\(49\)](#).

**Voluntariness Requirement Language.** The voluntariness requirement language is included in the instruction at CPJC 41.8 in this chapter only. It could, of course, be

modified and incorporated into the above instruction if the issue of voluntariness is raised. See also the voluntary possession comment at CPJC [41.7](#).

If modifying this instruction to include the voluntariness requirement language, be certain to also incorporate, at the appropriate locations, the additional element the state must prove and to alter any supporting language (for example, changing “You must all agree on elements 1, 2, and 3 listed above” to “You must all agree on elements 1, 2, 3, and 4 listed above”).

**CPJC 41.15 Instruction—Possession of Controlled Substance with Intent to Deliver****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of possession of a controlled substance with intent to deliver it. Specifically, the accusation is that *[insert specific allegations, e.g., the defendant did knowingly possess with intent to deliver a controlled substance, namely, cocaine [in an amount by aggregate weight, including any adulterants or dilutants, of [insert specific amount, e.g., one gram or more but less than four grams]]]*.

**Relevant Statutes**

A person commits an offense if the person knowingly possesses with intent to deliver a controlled substance [and the amount of the controlled substance is, by aggregate weight, including adulterants or dilutants, *[insert specific amount, e.g., one gram or more but less than four grams]*].

*[Substance]* is a controlled substance.

*[Include the following if the offense does not require a minimum weight.]*

To prove that the defendant is guilty of knowingly possessing *[substance]* with intent to deliver, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant possessed *[substance]*; and
2. the defendant knew he was possessing a controlled substance; and
3. the defendant intended to deliver the controlled substance.

*[Include the following if the offense requires a minimum weight.]*

To prove that the defendant is guilty of possession of *[substance]* with intent to deliver, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant possessed *[substance]*; and
2. the *[substance]* was, by aggregate weight, including adulterants or dilutants, *[insert specific amount, e.g., one gram]* or more; and

3. the defendant knew he was possessing a controlled substance; and
4. the defendant intended to deliver the controlled substance.

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of possession of a controlled substance with intent to deliver it.

### **Definitions**

#### *Possession*

“Possession” means actual care, custody, control, or management.

#### *Deliver*

“Deliver” means to transfer, actually or constructively, to another a controlled substance [regardless of whether there is an agency relationship]. The term includes offering to sell a controlled substance.

#### *Adulterant or Dilutant*

“Adulterant or dilutant” means any material that increases the bulk or quantity of a controlled substance, regardless of its effect on the chemical activity of the controlled substance.

#### *Knew He Was Possessing Controlled Substance*

The phrase *knew he was possessing a controlled substance* means a person was aware that he was possessing something and aware that what he was possessing was a substance that in fact was a controlled substance.

#### *Intended to Deliver Controlled Substance*

The phrase *intended to deliver a controlled substance* means it was the person’s conscious objective or desire to deliver something and the person knew that the thing he so intended to deliver was a substance that in fact was a controlled substance.

### **Application of Law to Facts**

*[Include the following if the offense does not require a minimum weight.]*

You must decide whether the state has proved, beyond a reasonable doubt, three elements. These elements are that—

1. the defendant, *[name]*, possessed *[substance]* in *[county]* County, Texas, on or about *[date]*; and
2. the defendant knew he was possessing a controlled substance; and
3. the defendant intended to deliver the controlled substance.

*[Include the following if the offense requires a minimum weight.]*

You must decide whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, *[name]*, possessed *[substance]* in *[county]* County, Texas, on or about *[date]*; and
2. the *[substance]* was, by aggregate weight, including adulterants or dilutants, *[amount]* gram[s] or more; and
3. the defendant knew he was possessing a controlled substance; and
4. the defendant intended to deliver the controlled substance.

*[Continue with the following.]*

You must all agree on [elements 1, 2, and 3/elements 1, 2, 3, and 4] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements [1, 2, and 3/1, 2, 3, and 4] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved each of the [three/four] elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

Delivery of a controlled substance in Penalty Group 1 is prohibited by and defined in [Tex. Health & Safety Code § 481.112](#). Delivery of a controlled substance in Penalty Group 2 is prohibited by and defined in [Tex. Health & Safety Code § 481.113](#). Delivery of a controlled substance in Penalty Group 3 or 4 is prohibited by and defined in

Tex. Health & Safety Code § 481.114. The definition of “deliver” is based on Tex. Health & Safety Code § 481.002(8). The definition of “adulterant or dilutant” is based on Tex. Health & Safety Code § 481.002(49). The definition of “possession” is from Tex. Health & Safety Code § 481.002(38) and Tex. Penal Code § 1.07(a)(39).

**Voluntariness Requirement Language.** The voluntariness requirement language is included in the instruction at CPJC 41.8 in this chapter only. It could, of course, be modified and incorporated into the above instruction if the issue of voluntariness is raised. See also the voluntary possession comment at CPJC 41.7.

If modifying this instruction to include the voluntariness requirement language, be certain to also incorporate, at the appropriate locations, the additional element the state must prove and to alter any supporting language (for example, changing “You must all agree on elements 1, 2, 3, and 4 listed above” to “You must all agree on elements 1, 2, 3, 4, and 5 listed above”).

*[Chapters 42 through 49 are reserved for expansion.]*

CHAPTER 50	CONSPIRACY	
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## CPJC 50.1 Conspiracy Generally

Conspiracy is defined in [Tex. Penal Code § 15.02\(a\)](#). The Penal Code requires that for a person to be guilty of criminal conspiracy, the person must act with intent that a felony be committed. There is no such thing as a conspiracy to commit a misdemeanor. [Tex. Penal Code § 15.02](#). Further, inchoate offenses under title 4, including attempt and conspiracy, do not apply to offenses defined outside of the Penal Code unless the outside offenses specifically so provide. *State v. Colyandro*, [233 S.W.3d 870](#) (Tex. Crim. App. 2007).

The felony used as the example in the instructions in this chapter is murder under [Tex. Penal Code § 19.02\(b\)\(1\)](#). Guidance for drafting instructions on murder may be found in *Texas Criminal Pattern Jury Charges—Crimes against Persons & Property*, chapter 80.

The State Bar has published instructions for party liability under [Tex. Penal Code § 7.02\(b\)](#). These instructions make all conspirators liable for any felony committed by a party in furtherance of the unlawful conspiracy, so long as it should have been anticipated as a result of the carrying out of the conspiracy. See *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions*, chapter 5. See also *Ex parte Thompson*, [179 S.W.3d 549](#) (Tex. Crim. App. 2005).

The state may not obtain a conviction on the uncorroborated testimony of a coconspirator, pursuant to the accomplice witness rule. See *Rice v. State*, [605 S.W.2d 895](#) (Tex. Crim. App. 1980).

Texas is a bilateral jurisdiction, similar to the federal system, so the state must prove an actual agreement between at least two persons who share the intent to commit the felony. Thus, a defendant cannot be convicted of conspiracy if the only coconspirator is a government agent. *Williams v. State*, [646 S.W.2d 221](#) (Tex. Crim. App. 1983) (evidence insufficient to prove conspiracy when only coconspirator worked for police and had no real intention that aggravated kidnapping be committed).

The primary purpose of the overt act requirement is to manifest that the conspiracy is at work. *Yates v. United States*, [354 U.S. 298](#), 334 (1957), *overruled on other grounds by Burks v. United States*, [437 U.S. 1](#) (1978). While no Texas court delineates the outer limits of what constitutes an overt act, the court of criminal appeals has held that the overt act “need not itself be a criminal act” but must “take the conspiracy beyond a mere meeting of the minds.” *McCann v. State*, [606 S.W.2d 897](#), 900 (Tex. Crim. App. 1980).

The Committee could find no Texas case resolving the issue of whether the state can rely on an overt act not alleged in the charging instrument. The Fifth Circuit allows this. See *United States v. Carlock*, [806 F.2d 535](#), 550 (5th Cir. 1986), *cert. denied*, [480 U.S. 949](#)–50 (1987).

Whether one or multiple overt acts should be included in the jury instruction may depend on how the conspiracy is pled in the charging instrument. For example, in *Nunez v. State*, [215 S.W.3d 537](#), 541–42 (Tex. App.—Waco 2007, pet. ref’d), the aggravated robbery indictment alleged that the defendant “hid in the bushes, at night, while armed with a deadly weapon, to wit a firearm, near the entrance of a business named Cafe Adobe.” However, the jury was charged with three separate overt acts: (1) “hid in some bushes at night”; (2) “hid in some bushes while armed with a deadly weapon, to wit: a firearm”; or (3) “hid near the entrance of a business named Cafe Adobe.” This charge authorized a conviction if the jury found any one of the three to be true. The court held that the charge was erroneous (though ultimately harmless) because it authorized a conviction on a theory different from that alleged in the indictment. *Nunez*, [215 S.W.3d at 542](#). The indictment alleged one overt act with multiple actions, and these could not be submitted as separate overt acts.

A number of intermediate appellate courts have held in cases involving Texas Penal Code section 71.02 (conspiracy to engage in organized criminal activity) that the jury must all agree that at least one alleged overt act was committed by each conspirator during the course of the conspiracy, but they need not all agree on which specific overt act or acts listed in the jury charge were committed. *Cf. O’Brien v. State*, [544 S.W.3d 376](#), 392–93 (Tex. Crim. App. 2018) (“When the State charges a defendant with engaging by conspiracy—as with any conspiracy—jury unanimity is not required regarding the particular overt acts alleged because the gravamen of the offense is the agreement.”); *see, e.g., Bogany v. State*, [54 S.W.3d 461](#), 462–63 (Tex. App.—Houston [1st Dist.] 2001, pet. ref’d) (no jury unanimity is required on issue of which overt act was committed); *Daniel v. State*, [704 S.W.2d 952](#), 954 (Tex. App.—Fort Worth 1986, no pet.) (holding that when more than one overt act is alleged in charging instrument, all overt acts raised by evidence should be submitted to jury).

The affirmative defense of renunciation and punishment mitigation by quasi-renunciation are discussed in depth at CPJC [52.6](#) and CPJC [52.7](#) in this volume.

**CPJC 50.2 Instruction—Liability for Conspiracy****INSTRUCTIONS OF THE COURT****Accusation**

*[Insert relevant accusation unit for specific felony. The following example is for the felony of murder under Texas Penal Code section 19.02(b)(1).]*

The state accuses the defendant of having committed the offense of conspiracy to commit murder. Specifically, the accusation is that the defendant *[insert specific allegations, e.g., with the intent to commit the offense of murder, agreed with one or more persons, namely [name(s)], that one or more of them would intentionally cause the death of an individual, [name], by shooting [name] with a firearm and [the defendant/one of the conspirators] performed an overt act in pursuance of the agreement, namely purchasing a firearm with which to shoot [name]].*

**Relevant Statutes**

*[Insert relevant statutes and definitions units for charged offense. The following example is for a Texas Penal Code section 15.02 charge, in which the conspiracy was to commit murder. See Texas Penal Code section 19.02(b)(1).]*

A person commits the offense of conspiracy to commit a felony if, with the intent to commit a felony, he agrees with one or more persons that they or one or more of them engage in conduct that would constitute a felony offense, and he or one or more of them performs an overt act in pursuance of the agreement.

An agreement constituting a conspiracy may be inferred from the acts of the parties.

A person commits the felony offense of murder if the person intentionally or knowingly causes the death of an individual.

*[Include the following if raised by the evidence.]*

A person can be convicted of conspiracy even if the evidence proves that the object offense was actually committed, but the state need not prove that the object offense was actually committed.

*[Continue with the following.]*

To prove that the defendant is guilty of conspiracy to commit murder, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant agreed with one or more persons that they or one or more of them would engage in conduct that would constitute a murder,
2. the defendant entered into the agreement with the intent that a murder be committed, and
3. the defendant or one or more of the other conspirators performed an overt act in pursuance of the murder.

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of conspiracy to commit murder.

### **Definitions**

#### *Intent to Commit a Murder*

A person acts with the intent to commit a murder when the person has the conscious objective or desire to cause the death of another individual.

#### *Conduct*

“Conduct” means a bodily movement [, whether involuntary or voluntary,] [and includes speech] and its accompanying mental state [or an omission and its accompanying mental state].

#### *Overt Act*

An overt act need not be in itself criminal, but it must be taken in pursuance of the agreement and it must take the conspiracy beyond a mere meeting of the minds.

*[Additional definitions may be helpful, such as “murder” (Texas Penal Code section 19.02) and the culpable mental states (Texas Penal Code section 6.03).]*

**Application of Law to Facts**

*[Include relevant application of law to facts unit for charged offense. The following example is for a Texas Penal Code section 15.02 charge, in which the conspiracy was to commit murder. See Texas Penal Code section 19.02(b)(1).]*

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, [name], in [county] County, Texas, on or about [date], agreed with one or more persons, namely [name(s)], [insert specific allegations, e.g., that one of the conspirators would shoot [name] with a fire-arm];
2. the defendant, [name], [insert specific allegations, e.g., entered into the agreement with the intent that one of the conspirators would murder [name]]; and
3. [the defendant, [name],/one of the other conspirators] [insert specific allegations, e.g., performed an overt act in pursuance of the agreement to commit murder, that is, [the defendant/one of the conspirators] purchased a firearm to be used to shoot [name]].

*[Include the following if raised by the evidence.]*

You must all agree that at least one overt act was committed by at least one member of the conspiracy, but you do not have to all agree on which specific overt [act was/acts were] committed or who committed the overt act[s].

*[Continue with the following.]*

You must all agree on elements 1, 2, and 3 listed above.

If you all agree that the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree that the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must [find the defendant “guilty”/proceed to consider whether the defendant has proved the defense of renunciation].

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions. If the affirmative*

*defense of renunciation should be considered, use the instruction at CPJC 50.3. If the issue of punishment mitigation by quasi-renunciation should be considered, use the punishment instruction and verdict form at CPJC 50.4.]*

### COMMENT

Conspiracy is prohibited by and defined in [Tex. Penal Code § 15.02](#). This instruction is based on an indictment for conspiracy to commit a murder as defined by [Tex. Penal Code § 19.02\(b\)\(1\)](#). The court will need to modify this instruction depending on the accusation.

A defendant cannot be convicted of conspiracy if the only coconspirator is a government agent. *Williams v. State*, 646 S.W.2d 221 (Tex. Crim. App. 1983) (evidence insufficient to prove conspiracy when only coconspirator worked for police and had no real intention that aggravated kidnapping be committed). If the evidence raises this issue, modify the instruction as needed.

The Committee’s sample instruction lists only one overt act. If more than one overt act is submitted, modify the instruction as needed.

Texas Penal Code section 15.02(c) sets out a number of circumstances that may have provided a defense at common law but under the modern Penal Code do not constitute defenses. One of these nondefenses—section 15.02(c)(2)—provides that “[i]t is no defense to prosecution for criminal conspiracy that . . . one or more of the coconspirators has been acquitted, so long as two or more coconspirators have not been acquitted.” The negative implication of this language is that it is a defense to prosecution that all coconspirators other than the defendant have been acquitted. Nevertheless, Penal Code section 2.03(a) states that defenses in the Penal Code will only be expressly labeled by the phrase: “It is a defense to prosecution...” Also, the court of criminal appeals held in *Giesberg v. State*, 984 S.W.2d 245, 250 (Tex. Crim. App. 1998), that “a defense which is not recognized by the Legislature as either a defense or as an affirmative defense does not warrant a separate instruction.” Consequently, the Committee does not recommend a defensive instruction based on section 15.02(c)(2).

A person cannot be guilty of conspiracy unless there is a real agreement between two or more parties who both have criminal intent.

If the issue of venue is raised at trial, refer to Texas Code of Criminal Procedure article 13.13.

**Definitions of “Conduct” and “Act.”** Practitioners should tailor the definition of “conduct” to the case. See *Burnett v. State*, 541 S.W.3d 77, 84 (Tex. Crim. App. 2017) (only portions of statutory definitions that are supported by the evidence should be submitted in jury instructions). Including the complete Penal Code definition of “conduct”—i.e., “an act or omission and its accompanying mental state”—introduces the idea into the jury instruction that the target felony could be an omission. This may or

may not be the case. Under Penal Code section 6.01(c), failing to perform an act is not a crime unless the law expressly makes it so or provides that the defendant has a duty to perform the act. In typical conspiracy cases, the object offense will be a crime of action, not omission. In these cases, it is appropriate to tailor the definition not to include an omission.

The definition of “conduct” includes the term “act,” which, in turn, is defined as “a bodily movement, whether voluntary or involuntary, and includes speech.” [Tex. Penal Code § 1.07\(a\)\(1\)](#). Jury instructions that define “conduct” also typically include a separate definition of “act.” Conspiracy instructions have the additional complication that the offense requires an “overt act,” and it is not clear that the definition of “act” applies to this phrase, although courts have assumed it does for other offenses. *See State v. Diaz–Bonilla*, [495 S.W.3d 45](#), 51 (Tex. App.—Houston [14th Dist.] 2016, pet. ref’d) (construing “overt act” for engaging in organized criminal activity by reference to section 1.07(a)(1)’s definition of act); *Marshall v. State*, No. 14-95-01183-CR, 1996 WL 491654, at \*2 (Tex. App.—Houston [14th Dist.] Aug. 29, 1996, pet. ref’d) (not designated for publication) (referencing section 1.07(a)(1)’s definition for overt act in impersonating a public servant); *see also State v. K.E.W.*, [315 S.W.3d 16](#), 22 (Tex. 2010) (construing phrase in mental health commitment statute, explaining “We do not see any indication the Legislature intended to limit the term ‘overt act’ to physical conduct as opposed to any other action objectively perceptible, including verbal statements.”). “Overt act”—as a term of art with a long history—may mean something different than what results from combining the common understanding of “overt” and the statutory definition of “act.” It might, for instance, require a deed and not “mere” speech. *See Cramer v. United States*, [325 U.S. 1](#), 61 (1945) (Douglas, J., dissenting) (“[T]he requirement of an overt act [to constitute proof of treason under [U.S. Const. Art. III, § 3](#)] is designed to preclude punishment for treasonable plans or schemes or hopes which have never moved out of the realm of thought or speech.”). Because of the inchoate nature of conspiracy, the “overt act” requirement functions as a safeguard against convictions based on a plan “still resting solely in the minds of the conspirators” and where it is not yet “manifest that the conspiracy is at work.” *Yates v. United States*, [354 U.S. 298](#), 334 (1957), *overruled on other grounds by Burks v. United States*, [437 U.S. 1](#) (1978). While not setting out a comprehensive definition, the instructions tell jurors that “an overt act need not be in itself criminal, but it must be taken in pursuance of the agreement and it must take the conspiracy beyond a mere meeting of the minds.” The statute itself requires that the overt act be “in pursuance of the agreement.” To further avoid suggesting that “bodily movement . . . includ[ing] speech” sets the boundaries of what “act” means within the phrase “overt act,” the instructions do not include a separate definition of “act” and, instead, fully incorporate the definition of “act” within the meaning of “conduct.” In most instances, the evidence will not raise an issue of voluntariness or mere speech, and thus the definition of “conduct” can be limited to “a bodily movement and its accompanying mental state.”

**CPJC 50.3     Instruction—Liability for Conspiracy—Affirmative  
Defense of Renunciation (Texas Penal Code Section  
15.04(b))**

*[Insert instructions for underlying offense.]*

**Renunciation**

You have heard evidence that the defendant renounced his criminal objective by withdrawing from the conspiracy to commit the murder of *[name]* and taking affirmative action that prevented the commission of the murder.

**Relevant Statutes**

It is an affirmative defense to conspiracy to commit murder that under circumstances manifesting a voluntary and complete renunciation of his criminal objective the defendant withdrew from the conspiracy before commission of the murder and took further affirmative action that prevented the commission of the murder.

Renunciation is an affirmative defense. Therefore the defendant must prove, by a preponderance of the evidence, two elements. The elements are that—

1. the defendant, *[name]*, withdrew from the conspiracy before commission of the intended offense and took further affirmative action that prevented the commission of the intended offense; and
2. the circumstances manifested a voluntary and complete renunciation of the defendant's criminal objective.

**Burden of Proof**

The burden is on the defendant to prove, by a preponderance of the evidence, that he comes within the affirmative defense of renunciation.

**Definitions**

*Intent to Commit a Murder*

A person acts with the intent to commit a murder when the person has the conscious objective or desire to cause the death of another individual.



*Preponderance of the Evidence*

“Preponderance of the evidence” means the greater weight and degree of the credible evidence.

*Voluntary Renunciation of a Criminal Objective*

Renunciation is not voluntary if it is motivated in whole or in part—

1. by circumstances not present or apparent at the inception of the defendant’s course of conduct that increase the probability of detection or apprehension or that make more difficult the accomplishment of the objective, or
2. by a decision to postpone the criminal conduct until another time or to transfer the criminal act to another but similar objective or victim.

**Application of Law to Facts**

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the defendant has proved, by a preponderance of the evidence, that his conduct comes within the affirmative defense of renunciation.

To decide the issue of renunciation, you must decide whether the defendant has proved, by a preponderance of the evidence, two elements. The elements are that—

1. he withdrew from the conspiracy before any conspirator committed murder or caused the death of [name] and took further affirmative action that prevented the murder of [name], and
2. the circumstances made it plain that the defendant voluntarily and completely renounced his criminal objective to murder [name].

You may decide that the defendant has proved elements 1 and 2 by a preponderance of the evidence only if you all agree that the defendant has proved both elements. If you find that the defendant has proved, by a preponderance of the evidence, both of the elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of conspiracy to commit murder, and you all agree the defendant has not proved, by a preponderance of the evidence, both of the elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

#### COMMENT

The affirmative defense of renunciation is provided for in [Tex. Penal Code § 15.04\(b\)](#).

**CPJC 50.4    Instruction—Liability for Conspiracy—Punishment  
Mitigation by Quasi-Renunciation (Texas Penal Code  
Section 15.04(d))**

You have found the defendant, [name], guilty of conspiracy to commit murder. It is now your duty to assess punishment. Before you assess punishment, however, you must address a preliminary question. The range of punishment from which you must choose depends on your answer to that question.

You must determine whether the defendant has proved, by a preponderance of the evidence, that he renounced his criminal objective.

**Relevant Statutes**

If the defendant proves that he renounced his criminal objective, this offense is punishable by—

1. a term of imprisonment for no less than two years and no more than ten years, or
2. a term of imprisonment for no less than two years and no more than ten years and a fine of no more than \$10,000.

If the defendant does not prove that he renounced his criminal objective, this offense is punishable by—

1. a term of imprisonment for no less than two years and no more than twenty years, or
2. a term of imprisonment for no less than two years and no more than twenty years and a fine of no more than \$10,000.

A defendant proves he renounced his criminal objective only if the defendant proves, by a preponderance of the evidence, two elements. The elements are that—

1. he withdrew from the conspiracy before the intended criminal offense was committed, and
2. he made substantial effort to prevent the commission of the intended offense.

You must all agree on whether the defendant has proved that he renounced the object offense.

**Burden of Proof**

The burden is on the defendant to prove, by a preponderance of the evidence, that he renounced his criminal objective.

**Definitions***Preponderance of the Evidence*

“Preponderance of the evidence” means the greater weight and degree of the credible evidence.

**Application of Law to Facts**

You must determine whether the defendant has proved, by a preponderance of the evidence, both elements of renunciation of the criminal objective. The elements are that—

1. he withdrew from the conspiracy before any conspirator killed [name], and
2. he made substantial effort to prevent the murder of [name].

You must all agree on whether the defendant has proved this before you assess punishment. Your resolution of this issue will determine which of the two verdict forms you will use. If you all agree that the defendant has proved that he renounced his criminal objective, use the first verdict form, titled “Verdict—Defendant Has Proved Renunciation of Criminal Objective.” If you all agree that the defendant has not proved that he renounced his criminal objective, use the second verdict form, titled “Verdict—Defendant Has Not Proved Renunciation of Criminal Objective.”

If you all agree that the defendant has proved, by a preponderance of the evidence, that he renounced his criminal objective, you are to determine and state in your verdict—

1. a term of imprisonment for no less than two years and no more than ten years, or
2. a term of imprisonment for no less than two years and no more than ten years and a fine of no more than \$10,000.

If you all agree that the defendant has not proved, by a preponderance of the evidence, that he renounced his criminal objective, you are to determine and state in your verdict—

1. a term of imprisonment for no less than two years and no more than twenty years, or
2. a term of imprisonment for no less than two years and no more than twenty years and a fine of no more than \$10,000.

**VERDICT—DEFENDANT HAS PROVED RENUNCIATION OF  
CRIMINAL OBJECTIVE**

We, the jury, having found the defendant, [name], guilty of the offense of criminal conspiracy to commit murder, all agree that the defendant has proved that he renounced his criminal objective. We assess the defendant's punishment at: (select one)

- \_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ years and no fine.
- \_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ years and a fine of \$\_\_\_\_\_.

\_\_\_\_\_  
Foreperson of the Jury

\_\_\_\_\_  
Printed Name of Foreperson

**VERDICT—DEFENDANT HAS NOT PROVED RENUNCIATION OF  
CRIMINAL OBJECTIVE**

We, the jury, having found the defendant, [name], guilty of the offense of criminal conspiracy to commit murder, all agree that the defendant has not proved that he renounced his criminal objective. We assess the defendant's punishment at: (select one)

- \_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ years and no fine.
- \_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ years and a fine of \$\_\_\_\_\_.

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Foreperson of the Jury

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Printed Name of Foreperson

**COMMENT**

Punishment mitigation for quasi-renunciation is provided for in [Tex. Penal Code § 15.04\(d\)](#).

CHAPTER 51	SOLICITATION	
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## CPJC 51.1 General Comments

Criminal solicitation under [Tex. Penal Code § 15.03\(a\)](#) is limited to solicitations to commit either a capital felony or a first-degree felony. The felony used as the example in the instructions in this chapter is capital murder under [Tex. Penal Code § 19.03\(a\)\(3\)](#). Guidance for drafting instructions on murder may be found in *Texas Criminal Pattern Jury Charges—Crimes against Persons & Property*, chapter 80.

The offense of criminal solicitation requires proof that the defendant acted “with intent that a capital felony or felony of the first degree be committed.” Two specific aspects of section 15.03 deserve comment. First, the request, command, or attempt to induce another must be “to engage in specific conduct, that under the circumstances surrounding his conduct as the actor believes them to be, would constitute the felony or make the other a party to its commission.”

Several cases addressing claims of fundamental deficiency in indictments have commented that this language was intended only to preclude impossibility as a defense and thus does not constitute an element of criminal solicitation. *Hobbs v. State*, [548 S.W.2d 884](#), 887 (Tex. Crim. App. 1977) (no allegation of this purported element); *Robinson v. State*, [764 S.W.2d 367](#), 370–71 (Tex. App.—Dallas 1989, no pet.) (inadequate allegation of this purported element).

These cases do not, however, deal with jury submission. The Committee concluded that the legislature most likely intended the language at issue as a substantive part of the definition of criminal solicitation. Thus the instructions include it.

Second, [Tex. Penal Code § 15.03\(b\)](#) provides a special corroboration requirement applicable when the state relies on a witness who was the person that was actually solicited:

A person may not be convicted under this section on the uncorroborated testimony of the person allegedly solicited and unless the solicitation is made under circumstances strongly corroborative of both the solicitation itself and the actor’s intent that the other person act on the solicitation.

Despite the statutory reference to circumstances “strongly corroborative,” many courts have concluded that the standard applicable is no more stringent than that applicable to accomplice witness situations under Texas Code of Criminal Procedure article 38.14. One court explained:

To determine if the corroboration [required by [Tex. Penal Code Ann. § 15.03\(b\)](#)] is sufficient the accomplice testimony must be eliminated from consideration and it must be determined whether there is other incriminating evidence tending to connect the defendant with the crime. *Adams v. State*, [685 S.W.2d 661](#), 665 (Tex. Crim. App. 1985); *Richardson [v. State]*, [700 S.W.2d 591](#), 594 [(Tex. Crim. App. 1985)]. It is not necessary that the corroboration directly link the defendant with the crime or that it be suffi-



cient evidence in itself to establish guilt. *Richardson*, 700 S.W.2d at 594. The court should consider all of the non-accomplice evidence even if it is entirely circumstantial.

*Thomas v. State*, 31 S.W.3d 422, 424 (Tex. App.—Fort Worth 2000, pet. ref’d).

**Corroboration Requirement.** The Committee considered two related aspects of jury submission of the corroboration requirement. First, should the requirement not only be included in the abstract portions of the instructions but also incorporated into the application of law to facts portion? See *Lankford v. State*, 255 S.W.3d 275, 280 (Tex. App.—Waco 2008, pet. ref’d) (noting that “[s]everal cases have indicated that the better practice is for the trial court to submit an instruction on corroboration in the application paragraph,” assuming—without deciding—trial court erred in failing to do so, but finding any error harmless); *Sterling v. State*, No. 05-08-00347-CR, 2012 WL 1004732, at \*5–6 (Tex. App.—Dallas 2012, pet. ref’d) (not designated for publication) (“[E]ven if it was error not to incorporate the corroboration instruction into the two application paragraphs, there was no egregious harm to appellant given the substantial amount of corroborating evidence in this case.”).

Second, should the corroboration instructions themselves include an application portion? See *Barton v. State*, No. 03-07-00423-CR, 2008 WL 1827492, at \*6 (Tex. App.—Austin Apr. 23, 2008, pet. ref’d) (not designated for publication) (“Texas courts have expressed approval of corroboration instructions that contain . . . an application paragraph.”). Apparently the only way an application portion would be more specific is that it would identify by name the witness whose testimony requires corroboration. See *Bell v. State*, 768 S.W.2d 790, 799–800 (Tex. App.—Houston [14th Dist.] 1989, pet. ref’d) (example of two-part instruction).

The Committee concluded that the corroboration requirement is not an element of the offense of solicitation, so placement in the application of law to facts unit of the instructions would be unnecessary and inappropriate.

Nearly the same result is accomplished by putting a purely abstract version of the requirement in the relevant statutes unit of the instructions and then adding a unit—sufficiency of corroboration—that presents it again and applies it by specifying the witness whose testimony must be corroborated.

**Renunciation and Quasi-Renunciation.** The affirmative defense of renunciation and punishment mitigation by quasi-renunciation are discussed in depth at CPJC 52.6 and CPJC 52.7 in this volume.

**Defining Terms.** Renunciation and quasi-renunciation for criminal solicitation occur when the actor “countermand[s]” his solicitation. *Tex. Penal Code* § 15.04(b), (d). The Committee was concerned that many jurors would not understand the precise meaning of “countermand.” As applied to the renunciation defense, the common definition requires not just abandoning the effort at soliciting the crime but issuing a contrary instruction that revokes the prior solicitation. See *Gordon v. State*, No. 05-14-

00824-CR, 2015 WL 4977017, at \*3 (Tex. App.—Dallas Aug. 20, 2015, pet. ref’d) (not designated for publication) (citing *Webster’s Dictionary* and defining “countermand” in a sufficiency review as “‘to revoke (a former command)’ or ‘cancel or rescind (an order) by giving a contrary order’; or ‘to recall or order back by a superseding contrary order’” and holding that reporting crime to police did not constitute countermanding a solicitation); see also *Cook v. State*, No. 04-17-00149-CR, 2018 WL 3747737 (Tex. App.—San Antonio Aug. 8, 2018, no pet.) (citing same definition). Several members of the Committee were concerned that jurors would not appreciate the requirement of making a superseding contrary instruction without some guidance in the jury instructions. Nevertheless, the court of criminal appeals has held that it is improper to provide a nonstatutory definition of a term that has not acquired a technical, legal meaning. See *Green v. Texas*, 476 S.W.3d 440, 445 (Tex. Crim. App. 2015) (error to define “penetrate” and “female sexual organ” since these are common terms that jurors are “free to assign any meaning that is acceptable in common parlance”). Trial courts do not have the liberty to refer in their jury instructions, as appellate courts frequently do, to dictionary definitions of statutorily undefined common terms. When appellate courts do so, it is often in a sufficiency review, which asks whether there is evidence from which any rational jury can convict beyond a reasonable doubt. When appellate courts use these definitions, it is not because the jury is required to do so, but because a rational jury would be permitted to do so. Applying a limited definition in the jury instructions that a jury is not required to follow could constitute an improper comment on the weight of the evidence. See *Green*, 476 S.W.3d at 445; *Kirsch v. State*, 357 S.W.3d 645, 651–52 (Tex. Crim. App. 2012). Practitioners would, of course, be free to argue appropriate common definitions during jury argument, or, if the parties agreed, the instructions could provide a definition for “countermand his solicitation” such as “to revoke his solicitation by giving a contrary instruction.” Without such agreement, the Committee concluded that the instructions should not provide a non-statutory definition of “countermand.”

Several Committee members also believed that the term “corroboration,” or “corroborative,” would give jurors similar difficulty. This term, like “countermand,” is also undefined by statute. The corroboration requirement for solicitation has been held to be analogous to accomplice-witness corroboration in Code of Criminal Procedure article 38.14. See *Richardson v. State*, 700 S.W.2d 591, 594 (Tex. Crim. App. 1985). Unlike accomplice-witness corroboration, where jurors are told the standard required for corroboration (i.e., that the other evidence “tends to connect” the defendant to the commission of the offense), the statute for corroboration of the solicited person’s testimony provides no other guidance on what it might mean to be “strongly corroborative.” Nevertheless, as with “countermand,” the Committee concluded that the jury instructions should not define “corroboration” or “corroborative” as to do so (absent some agreement by the parties) would risk intruding on the jury’s prerogative to apply any accepted definition of the term in common parlance.

**CPJC 51.2     Instruction—Criminal Solicitation—Solicitation of Another to Personally Commit Offense**

**INSTRUCTIONS OF THE COURT**

**Accusation**

*[Insert relevant accusation unit for specific felony. The following example is for the felony of capital murder under Texas Penal Code section 19.03(a)(3).]*

The state accuses the defendant of the offense of criminal solicitation. Specifically, the accusation is that the defendant, with the intent that a capital felony, namely capital murder, be committed, requested, commanded, or attempted to induce *[name of solicited party]* to engage in the specific conduct of *[insert specific allegations, e.g., intentionally or knowingly causing the death of [name] for remuneration or the promise of remuneration]*, that under the circumstances surrounding the conduct of *[name of solicited party]* as the defendant believed them to be, would constitute the capital felony of capital murder or make *[name of solicited party]* a party to the capital felony of capital murder.

**Relevant Statutes**

*[Insert relevant statutes and definitions units for charged offense. The following example is for a Texas Penal Code section 15.03 charge, in which the solicitation was to commit capital murder. See Texas Penal Code section 19.03(a)(3).]*

A person commits an offense if, with intent that a capital felony or felony of the first degree be committed, he requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute the felony or make the other a party to its commission.

A person may not be convicted under this section on the uncorroborated testimony of the person allegedly solicited.

A person may not be convicted under this section unless the solicitation is made under circumstances strongly corroborative of both the solicitation itself and the actor's intent that the other person act on the solicitation.

*[Include the following if raised by the evidence.]*

A person may be convicted of solicitation even if the person solicited is not criminally responsible for the felony solicited.

*[Include the following if raised by the evidence.]*

A person may be convicted of solicitation even if the person solicited has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution.

*[Include the following if raised by the evidence.]*

A person may be convicted of solicitation even if the person belongs to a class of persons that by definition of the felony solicited is legally incapable of committing the offense in an individual capacity.

*[Include the following if raised by the evidence.]*

A person may be convicted of solicitation even if the felony solicited was actually committed.

*[Continue with the following.]*

To prove that the defendant is guilty of criminal solicitation of a [capital felony/felony of the first degree], the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant requested, commanded, or attempted to induce another to engage in specific [conduct/acts];
2. the [conduct/acts] would, if the circumstances surrounding the other's conduct were as the defendant believed them to be, either:
  - a. constitute a [capital felony/felony of the first degree]; or
  - b. make the other a party to the commission of a [capital felony/felony of the first degree]; and
3. the defendant did this with intent that a [capital felony/felony of the first degree] be committed.

### *Sufficiency of Corroboration*

In order to convict the defendant you must believe that—

1. the testimony of the person the state contends was solicited, [*name of solicited party*], is corroborated by evidence other than that given by [*name of solicited party*];
2. the solicitation was made under circumstances strongly corroborative of the solicitation itself; and
3. the solicitation was made under circumstances strongly corroborative of the defendant's intent that [*name of solicited party*] act on the solicitation.

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of criminal solicitation.

### **Definitions**

#### *Intent That a [Capital Felony/Felony of the First Degree] Be Committed*

A person acts with intent that a [capital felony/felony of the first degree] be committed if the person has the conscious objective or desire that someone engage in conduct that under the circumstances surrounding the conduct, as the person believes those circumstances to be, would constitute a [capital felony/felony of the first degree].

#### *Conduct*

“Conduct” means an act [or omission] and its accompanying mental state.

#### *Act*

“Act” means a bodily movement [, whether voluntary or involuntary,] [and includes speech].

#### *Capital Murder*

A person commits capital murder if he intentionally or knowingly causes the death of an individual for remuneration or the promise of remuneration.

Capital murder is a capital felony.

#### *Intentionally Causing the Death of an Individual*

A person intentionally causes the death of an individual if the person has the conscious objective or desire to cause that death.

*Knowingly Causing the Death of an Individual*

A person knowingly causes the death of an individual if the person is aware that his conduct is reasonably certain to cause that death.

*Party to a [Capital Felony/Felony of the First Degree]*

A person is a party to a [capital felony/felony of the first degree] if the person does not by his own conduct commit the felony but the offense is committed by another for whose conduct the person is criminally responsible. A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, the person solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.

**Application of Law to Facts**

*[Include relevant application of law to facts unit for charged offense. The following example is for a Texas Penal Code section 15.03 charge, in which the solicitation was to commit capital murder. See Texas Penal Code section 19.03(a)(3).]*

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], requested, commanded, or attempted to induce [name of solicited party] to [insert specific offense, e.g., intentionally or knowingly cause the death of [name] for remuneration or the promise of remuneration];

*[Select one of the following. If the facts would permit the jury to find the solicited party would be a party to the intended offense, include the second option.]*

2. the conduct or acts that the defendant requested, commanded, or attempted to induce [name of solicited party] to do would, under the circumstances surrounding [name of solicited party]'s conduct, as the defendant believed them to be, constitute the capital felony of capital murder; and

*[or]*

2. the [conduct/acts] that the defendant requested, commanded, or attempted to induce [name of solicited party] to do would, under the circum-

stances surrounding [*name of solicited party*]’s conduct, as the defendant believed them to be, either:

- (a) constitute the capital felony of capital murder; or
- (b) make [*name of solicited party*] a party to the commission of the capital felony of capital murder; and

*[Continue with the following.]*

3. the defendant acted with intent that the capital felony of capital murder be committed.

*[If the first option for element 2, above, was used,  
include the following.]*

You must all agree on elements 1, 2, and 3 listed above.

*[If the second option for element 2, above, was used,  
include the following.]*

You must all agree on elements 1, 2, and 3 listed above, but you do not have to agree on whether element 2 is proved by the method listed in element 2.a or 2.b above.

*[Continue with the following.]*

If you all agree that the state has failed to prove, beyond a reasonable doubt, one or more of the elements 1, 2, and 3, above, you must find the defendant “not guilty” of criminal solicitation.

If you all agree that the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must [find the defendant “guilty”/proceed to consider whether the defendant has proved the defense of renunciation].

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions. If the affirmative defense of renunciation should be considered, use the instruction at CPJC 51.5. If the issue of punishment mitigation by quasi-renunciation should be considered, use the punishment instruction and verdict form at CPJC 51.6.]*

## COMMENT

Criminal solicitation is prohibited by and defined in [Tex. Penal Code § 15.03](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#).

This instruction is based on an indictment for solicitation to commit capital murder as defined by [Tex. Penal Code § 19.03\(a\)\(3\)](#). The court will need to modify this instruction depending on the accusation.

**Definitions of “Conduct” and “Act.”** Practitioners should tailor the definition of “conduct” to the case. *See Burnett v. State*, [541 S.W.3d 77](#), 84 (Tex. Crim. App. 2017) (only portions of statutory definitions that are supported by the evidence should be submitted in jury instructions). Including the complete Penal Code definition of “conduct”—i.e., “an act or omission and its accompanying mental state”—introduces the idea into the jury instruction that the target felony could be an omission. This may or may not be the case. Under Penal Code section 6.01(c), failing to perform an act is not a crime unless the law expressly makes it so or provides that the defendant has a duty to perform the act. In typical solicitation cases, the offense solicited will be a crime of action, not omission. In these cases, it is appropriate to tailor the definition so that it reads: “Conduct means an act and its accompanying mental state.” In the few instances when the target offense is a crime of omission and the relevant actor has a duty under law to act, the definition should be altered accordingly.

Similarly, in cases where the evidence does not raise an issue that the defendant’s actions may have consisted of only speech (or where there is no voluntariness issue), the definition of “act” in the jury instructions should be appropriately tailored to the facts, i.e., “‘Act’ means a bodily movement.”



**CPJC 51.3     Comment on Solicitation of Another to Induce Someone Else to Commit Offense**

In situations in which the state's theory is that the defendant solicited another to find a third party to commit the intended offense, the solicitation is likely to be aimed at conduct that would not constitute the commission of the intended offense by the party solicited. However, it would make the solicited party a party to that offense.

An indictment in such a case might provide as follows:

INDICTMENT: Don Defendant on or about February 29, 2015, did then and there with intent that a capital felony be committed, namely, capital murder, request, command, and attempt to induce Iris Intermediary to engage in specific conduct, namely, to induce another, Harvey Hitman, to intentionally and knowingly cause the death of Victor Victim for remuneration or the promise of remuneration that, under the circumstances surrounding Harvey Hitman's conduct as Don Defendant believed them to be, would make Harvey Hitman a party to the commission of capital murder.

The instruction given at CPJC [51.4](#) provides for submission only on this theory.

**CPJC 51.4    Instruction—Criminal Solicitation—Solicitation of Another to Induce Third Party to Commit Offense****INSTRUCTIONS OF THE COURT****Accusation**

*[Insert relevant accusation unit for specific felony. The following example is for the felony of capital murder under Texas Penal Code section 19.03(a)(3).]*

The state accuses the defendant of the offense of criminal solicitation. Specifically, the accusation is that the defendant, with the intent that a capital felony, namely capital murder, be committed, requested, commanded, or attempted to induce *[name of solicited party]* to engage in the specific conduct of *[insert specific allegations, e.g., inducing another, [name of intended final perpetrator of intended offense], to intentionally and knowingly cause the death of [name of victim of intended offense] for remuneration or the promise of remuneration]*, that under the circumstances surrounding the conduct of *[name of solicited party]* as the defendant believed them to be, would make *[name of solicited party]* a party to the capital felony of capital murder.

**Relevant Statutes**

*[Insert relevant statutes and definitions units for charged offense. The following example is for a Texas Penal Code section 15.03 charge, in which the solicitation was to commit capital murder. See Texas Penal Code section 19.03(a)(3).]*

A person commits an offense if, with intent that a [capital felony/felony of the first degree] be committed, he requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute the felony or make the other a party to its commission.

A person may not be convicted under this section on the uncorroborated testimony of the person allegedly solicited.

A person may not be convicted under this section unless the solicitation is made under circumstances strongly corroborative of both the solicitation itself and the actor's intent that the other person act on the solicitation.

*[Include the following if raised by the evidence.]*

A person may be convicted of solicitation even if the person solicited is not criminally responsible for the felony solicited.

*[Include the following if raised by the evidence.]*

A person may be convicted of solicitation even if the person solicited has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution.

*[Include the following if raised by the evidence.]*

A person may be convicted of solicitation even if the person belongs to a class of persons that, by definition of the felony solicited, is legally incapable of committing the offense in an individual capacity.

*[Include the following if raised by the evidence.]*

A person may be convicted of solicitation even if the felony solicited was actually committed.

*[Continue with the following.]*

To prove that the defendant is guilty of criminal solicitation of a [capital felony/felony of the first degree], the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant requested, commanded, or attempted to induce another to engage in specific [conduct/acts];
2. the [conduct/acts] would, if the circumstances surrounding the other's conduct were as the defendant believed them to be, either:
  - a. constitute a [capital felony/felony of the first degree], or
  - b. make the other a party to the commission of a [capital felony/felony of the first degree]; and
3. the defendant did this with intent that a [capital felony/felony of the first degree] be committed.

#### *Sufficiency of Corroboration*

In order to convict the defendant you must believe that—

1. the testimony of the person the state contends was solicited, [*name of solicited party*], is corroborated by evidence other than that given by [*name of solicited party*];
2. the solicitation was made under circumstances strongly corroborative of the solicitation itself; and
3. the solicitation was made under circumstances strongly corroborative of the defendant's intent that [*name of solicited party*] act on the solicitation.

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of criminal solicitation.

### **Definitions**

#### *Intent That a [Capital Felony/Felony of the First Degree] Be Committed*

A person acts with intent that a [capital felony/felony of the first degree] be committed if the person has the conscious objective or desire that someone engage in conduct that, under the circumstances surrounding the conduct as the person believes those circumstances to be, would constitute a [capital felony/felony of the first degree].

#### *Conduct*

“Conduct” means an act [or omission] and its accompanying mental state.

#### *Act*

“Act” means a bodily movement [, whether voluntary or involuntary,] [and includes speech].

#### *Capital Murder*

A person commits capital murder if he intentionally or knowingly causes the death of an individual for remuneration or the promise of remuneration.

Capital murder is a capital felony.

#### *Intentionally Causing the Death of an Individual*

A person intentionally causes the death of an individual if the person has the conscious objective or desire to cause that death.

*Knowingly Causing the Death of an Individual*

A person knowingly causes the death of an individual if the person is aware that his conduct is reasonably certain to cause that death.

*Party to a [Capital Felony/Felony of the First Degree]*

A person is a party to a [capital felony/felony of the first degree] if the person does not by his own conduct commit the felony but the offense is committed by another for whose conduct the person is criminally responsible. A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, the person solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.

**Application of Law to Facts**

*[Include relevant application of law to facts unit for charged offense. The following example is for a Texas Penal Code section 15.03 charge, in which the solicitation was to commit capital murder. See Texas Penal Code section 19.03(a)(3).]*

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], requested, commanded, or attempted to induce [name of solicited party] to induce another, [name of intended final perpetrator], to [insert specific solicited conduct, e.g., intentionally and knowingly cause the death of [name of victim of intended offense] for remuneration or the promise of remuneration];
2. the [conduct/acts] that the defendant requested, commanded, or attempted to induce [name of intended final perpetrator] to do would, under the circumstances surrounding [name of solicited party]’s conduct, as the defendant believed them to be, make [name of solicited party] a party to the commission of a capital felony; and
3. the defendant acted with intent that a capital felony, capital murder, be committed.

You must all agree on elements 1, 2, and 3 listed above.

If you all agree that the state has failed to prove, beyond a reasonable doubt, one or more of the elements 1, 2, and 3 above, you must find the defendant “not guilty” of criminal solicitation.

If you all agree that the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must [find the defendant “guilty”/proceed to consider whether the defendant has proved the defense of renunciation].

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions. If the affirmative defense of renunciation should be considered, use the instruction at CPJC 51.5. If the issue of punishment mitigation by quasi-renunciation should be considered, use the punishment instruction and verdict form at CPJC 51.6.]*

### COMMENT

Criminal solicitation is prohibited by and defined in [Tex. Penal Code § 15.03](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#).

This instruction is based on an indictment for solicitation to commit capital murder as defined by [Tex. Penal Code § 19.03\(a\)\(3\)](#). The court will need to modify this instruction depending on the accusation.

**Definitions of “Conduct” and “Act.”** Practitioners should tailor the definition of “conduct” to the case. *See Burnett v. State*, [541 S.W.3d 77](#), 84 (Tex. Crim. App. 2017) (only portions of statutory definitions that are supported by the evidence should be submitted in jury instructions). Including the complete Penal Code definition of “conduct”—i.e., “an act or omission and its accompanying mental state”—introduces the idea into the jury instruction that the target felony could be an omission. This may or may not be the case. Under Penal Code section 6.01(c), failing to perform an act is not a crime unless the law expressly makes it so or provides that the defendant has a duty to perform the act. In typical solicitation cases, the offense solicited will be a crime of action, not omission. In these cases, it is appropriate to tailor the definition so that it reads: “Conduct means an act and its accompanying mental state.” In the few instances when the target offense is a crime of omission and the relevant actor has a duty under law to act, the definition should be altered accordingly.

Similarly, in cases where the evidence does not raise an issue that the defendant’s actions may have consisted of only speech (or where there is no voluntariness issue), the definition of “act” in the jury instructions should be appropriately tailored to the facts, i.e., “‘Act’ means a bodily movement.”

**CPJC 51.5     Instruction—Criminal Solicitation—Affirmative Defense of Renunciation (Texas Penal Code Section 15.04(b))**

*[Insert instructions for underlying offense.]*

**Renunciation**

You have heard evidence that the defendant renounced his criminal objective by countermanding his solicitation to commit the capital murder of [name] and taking affirmative action that prevented the commission of the solicited offense.

**Relevant Statutes**

It is an affirmative defense to criminal solicitation that, under circumstances manifesting a voluntary and complete renunciation of his criminal objective, the defendant countermanded his solicitation before the commission of the solicited offense and took further affirmative action that prevented the commission of the solicited offense.

Renunciation is an affirmative defense. Therefore the defendant must prove, by a preponderance of the evidence, two elements. The elements are that—

1. the defendant, [name], countermanded his solicitation before commission of the solicited offense and took further affirmative action that prevented the commission of the solicited offense; and
2. the circumstances manifested a voluntary and complete renunciation of the defendant's criminal objective.

**Burden of Proof**

The burden is on the defendant to prove, by a preponderance of the evidence, the affirmative defense of renunciation.

**Definitions**

*Preponderance of the Evidence*

“Preponderance of the evidence” means the greater weight and degree of the credible evidence.

*Voluntary Renunciation of a Criminal Objective*

Renunciation of a criminal objective is not voluntary if it is motivated in whole or in part—

1. by circumstances not present or apparent at the inception of the defendant's course of conduct that increase the probability of detection or apprehension or that make more difficult the accomplishment of the objective, or
2. by a decision to postpone the criminal conduct until another time or to transfer the criminal act to another but similar objective or victim.

**Application of Law to Facts**

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the defendant has proved, by a preponderance of the evidence, the affirmative defense of renunciation.

To decide the issue of renunciation, you must determine whether the defendant has proved, by a preponderance of the evidence, two elements. The elements are that—

1. the defendant countermanded his solicitation before the commission of the solicited offense and took further affirmative action that prevented the commission of the solicited offense, and
2. the circumstances manifested a voluntary and complete renunciation of the defendant's criminal objective.

You may decide that the defendant has proven elements 1 and 2 by a preponderance of the evidence only if you all agree that the defendant has proven both elements. If you find that the defendant has proved, by a preponderance of the evidence, both of the elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of criminal solicitation, and you all agree the defendant has not proved, by a preponderance of the evidence, both of the elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*



**COMMENT**

The affirmative defense of renunciation is provided for in [Tex. Penal Code § 15.04\(b\)](#).

**CPJC 51.6 Instruction—Criminal Solicitation—Punishment Mitigation by Quasi-Renunciation (Texas Penal Code Section 15.04(d))**

You have found the defendant, [name], guilty of criminal solicitation. It is now your duty to assess punishment. Before you assess punishment, however, you must address a preliminary question. Your answer will determine the range of punishment.

You must determine whether the defendant has proved, by a preponderance of the evidence, that he renounced his criminal objective.

**Relevant Statutes**

If the defendant proves that he renounced his criminal objective, this offense is punishable by—

1. a term of imprisonment for no less than two years and no more than twenty years, or
2. a term of imprisonment for no less than two years and no more than twenty years and a fine of no more than \$10,000.

If the defendant does not prove that he renounced his criminal objective, this offense is punishable by—

1. a term of imprisonment for life or for a term of no less than five years and no more than ninety-nine years, or
2. a term of imprisonment for life or for a term of no less than five years and no more than ninety-nine years, and a fine of no more than \$10,000.

A defendant proves he renounced his criminal objective if the defendant proves, by a preponderance of the evidence, two elements. Those elements are that—

1. he countermanded his solicitation before the intended criminal offense was committed; and
2. he made substantial effort to prevent the commission of the intended offense.

You must all agree the defendant has proved both elements 1 and 2.

**Burden of Proof**

The burden is on the defendant to prove, by a preponderance of the evidence, that he renounced his criminal objective.

**Definition***Preponderance of the Evidence*

“Preponderance of the evidence” means the greater weight and degree of the credible evidence.

**Application of Law to Facts**

You must determine whether the defendant has proved, by a preponderance of the evidence, both elements of renunciation of the criminal objective. The elements are that—

1. he renounced his criminal objective by countermanding his solicitation before the intended criminal offense was committed, and
2. he made substantial effort to prevent the commission of the intended offense.

You must all agree on whether the defendant has proved this before you may assess punishment. Your resolution of this issue will determine the range of punishment you assess and which of the two verdict forms you will use. If you all agree the defendant has proved that he renounced his criminal objective, use the first verdict form, titled “Verdict—Defendant Has Proved Renunciation of Criminal Objective.” If you all agree the defendant has not proved that he renounced his criminal objective, use the second verdict form, titled “Verdict—Defendant Has Not Proved Renunciation of Criminal Objective.”

If you all agree the defendant has proved, by a preponderance of the evidence, that he renounced his criminal objective, you are to determine and state in your verdict—

1. a term of imprisonment for no less than two years and no more than twenty years, or
2. a term of imprisonment for no less than two years and no more than twenty years and a fine of no more than \$10,000.

If you all agree the defendant has not proved, by a preponderance of the evidence, that he renounced his criminal objective, you are to determine and state in your verdict—

1. a term of imprisonment for life or for a term of no less than five years and no more than ninety-nine years, or
2. a term of imprisonment for life or for a term of no less than five years and no more than ninety-nine years, and a fine of no more than \$10,000.

**VERDICT—DEFENDANT HAS PROVED RENUNCIATION OF  
CRIMINAL OBJECTIVE**

We, the jury, having found the defendant, [name], guilty of the offense of criminal solicitation, all agree that the defendant has proved that he renounced his criminal objective. We assess the defendant's punishment at: (select one)

- \_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ years and no fine.
- \_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ years and a fine of \$\_\_\_\_\_.

\_\_\_\_\_  
Foreperson of the Jury

\_\_\_\_\_  
Printed Name of Foreperson

**VERDICT—DEFENDANT HAS NOT PROVED RENUNCIATION  
OF CRIMINAL OBJECTIVE**

We, the jury, having found the defendant, [name], guilty of the offense of criminal solicitation, all agree that the defendant has not proved that he renounced his criminal objective. We assess the defendant's punishment at: (select one)

- \_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ years and no fine.
- \_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ years and a fine of \$\_\_\_\_\_.

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for life and no fine.

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for life and a fine of \$\_\_\_\_\_.

\_\_\_\_\_  
Foreperson of the Jury

\_\_\_\_\_  
Printed Name of Foreperson

**COMMENT**

Punishment mitigation by quasi-renunciation is provided for in [Tex. Penal Code § 15.04\(d\)](#).

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## CPJC 52.1 General Comments

Drafting jury instructions for criminal attempt as defined by section 15.01 of the Texas Penal Code presents a number of difficulties.

Texas attempt law as set out in Texas Penal Code section 15.01(a) requires “an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended.” Thus, the conduct offered to constitute attempt must meet what might be broken down into three separate criteria: (1) it must “amount[] to more than mere preparation” to commit the offense intended; (2) it must “tend[] . . . to effect the commission of the offense intended”; and (3) it must “fail[] to effect the commission of the offense intended.” [Tex. Penal Code § 15.01\(a\)](#).

This chapter contains instructions for two situations. The first is for a prosecution for attempted murder under [Tex. Penal Code § 19.02\(b\)\(1\)](#). Guidance for drafting instructions on murder may be found in *Texas Criminal Pattern Jury Charges—Crimes against Persons & Property*, chapter 80. The second—which presented certain additional drafting issues—is for attempted burglary of a building under [Tex. Penal Code § 30.02](#). Guidance for drafting instructions on burglary may be found in that same volume in chapter 91.

## CPJC 52.2 Formulating the Elements of Attempt

The Committee was split on how to formulate the elements of attempt. Some members favored separating the requirements that the act (1) “amount[] to more than mere preparation” to commit the offense intended, and (2) “tend[] . . . to effect the commission of the offense intended.” These Committee members believed that such separation would appropriately emphasize what the legislature intended as distinctly different requirements. They reasoned that the requirement that the act “tend[] . . . to effect the commission of the offense intended”—however imprecise it may be—was intended by the legislature to be substantively distinguishable from the requirement that the act “amount[] to more than mere preparation.” See [Tex. Penal Code § 15.01\(a\)](#).

A majority of the Committee, however, saw the two demands as closely related and best presented to juries as a single, albeit two-part, element of attempt. This was done in the Committee’s instructions.



### CPJC 52.3 Criteria for Determining Whether Defendant Went Far Enough

**Act Going beyond “Mere Preparation.”** The requirement that the act “amount[] to more than mere preparation” restates traditional attempt law. As early as 1857, the Texas Supreme Court observed that “[a]n attempt to commit a crime is defined to be an endeavor to accomplish it, carried beyond mere preparation, but falling short of the ultimate design, in any part of it.” *Lovett v. State*, 19 Tex. 174 (Tex. 1857) (citation omitted). The present statutory requirement of proof of an act “amounting to more than mere preparation,” while imprecise, has become acceptable through years of use in Texas and elsewhere. The Committee, therefore, saw no serious problems posed by putting this requirement in the jury instructions.

**Act Tending to Effect Commission of Intended Offense.** Some members of the Committee found the additional requirement that “the act tend[] . . . to effect the commission of the offense intended” more problematic.

This phrase is less common—but not unknown—to criminal law generally. New York used it in 1881 and retained it in that state’s 1965 revision of its penal law. *McKinney’s New York Penal Law* § 110.00 (“A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.”). Louisiana law requires “an act . . . tending directly toward the accomplishing of [the criminal] object. . . .” *La. Rev. Stat. Ann.* § 14:27(A). Nevada provides: “An act done with the intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime.” *Nev. Rev. Stat.* § 193.330(1). New Mexico specifies: “Attempt to commit a felony consists of an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission.” *N.M. Stat. Ann.* § 30-28-1.

Since its enactment in 1956, the Uniform Code of Military Justice has defined an attempt as requiring an act “amounting to more than mere preparation and tending . . . to effect its commission.” Uniform Code of Military Justice art. 80(a); 10 U.S.C. § 880. Similar or identical language also appears in a number of state law codes of military justice. The Texas Code of Military Justice, chapter 432 of the Texas Government Code, has, since its enactment in 1963, used identical language. *Tex. Gov’t Code* § 432.125.

Case law from those jurisdictions with similar language contains little to give precise meaning to the phrase. An early judicial discussion of the New York statutory language (requiring an act “tending . . . to effect [the crime’s] commission”) shows the difficulty New York courts have had in finding substance in the statutory language:

The word ‘tending’ is very indefinite. It is perfectly evident that there will arise differences of opinion as to whether an act in a given case is one *tending* to commit a crime. ‘Tending’ means to exert activity in a particular direction.

Any act in preparation to commit a crime may be said to have a tendency towards its accomplishment. The procuring of the automobile, searching the streets looking for the desired victim, were in reality acts tending toward the commission of the proposed crime. The law, however, had recognized that many acts in the way of preparation are too remote to constitute the crime of attempt. The line has been drawn between those acts which are remote and those which are proximate and near to the consummation. The law must be practical, and therefore considers those acts only as tending to the commission of the crime which are so near to its accomplishment that in all reasonable probability the crime itself would have been committed, but for timely interference. The cases which have been before the courts express this idea in different language, but the idea remains the same. The act or acts must come or advance very near to the accomplishment of the intended crime.

*People v. Rizzo*, 158 N.E. 888, 889–90 (N.Y. 1927).

Some members of the Committee were uncomfortable with instructions requiring the jury to find—without elaboration—that the state proved an act that tends to effect the commission of the intended offense. At least one member entertained doubt that such an approach could withstand proper application of the federal and state constitutional prohibitions against vague criteria for criminal liability.

The Committee majority, however, concluded it could not recommend instructions that elaborated on the statutory requirements. Texas case law contains no discussions appropriate for explaining the critical statutory terms to juries. No other source for elaboration on the meaning of the statutory terms appeared available. In any case, the majority believed, instructional elaboration on the statutory terminology—whatever the source of that elaboration—is quite likely to constitute impermissible comment on the evidence.

Whether this requirement creates a defense of factual impossibility or even a requirement of proof that an attempt could succeed is considered in CPJC 52.4. The possibility that it could be so read, however, increased the concern of some members of the Committee that the statutory language without elaboration is unacceptably imprecise.

**Act That Fails to Effect Commission of Intended Offense.** [Tex. Penal Code § 15.01](#)(a) requires the act be one that (among other things) “fails to effect commission of [the intended offense].” Section 15.01(c) nullifies this by providing: “It is no defense to prosecution for criminal attempt that the offense attempted was actually committed.” The problem for the Committee was how—if at all—this should be reflected in jury instructions.

The law is clear that if the state’s evidence shows an attempt, no legal significance flows from the fact that the evidence also shows the attempt was successful. Current practice seems generally to include in the instructions all of the section 15.01 lan-

guage. Instructions could, of course, simply ignore both section 15.01(a)'s "fails to effect" language and section 15.01(c)'s "no defense" language. The Committee was, however, uncomfortable suggesting instructions that totally omitted this much statutory language.

The Committee decided to recommend instructions based on the following positions: (1) the relevant statutes unit should include the section 15.01(a) "fails to effect" language because it is in the statutory definition of the offense; (2) the relevant statutes unit should include section 15.01(c)'s "no defense" law if—but only if—the facts could reasonably be construed by the jury as showing the intended crime was successfully completed; and (3) the application of law to facts unit should generally include as part of the second element a requirement that the state prove the act tended but failed to effect commission of the intended offense, but the "but failed" language should be included only if the facts could not be construed as showing the intended crime was successfully completed.

The Committee's rationale was, first, that the statutory language should generally be included because it is statutory. Second, juries should not be confronted (in the relevant statutes unit of the instruction) with the contradictory statutory provisions unless the facts might be construed as invoking the matter. Third, in the application of law to facts unit, the statutory requirement should be included when it could not affect the jury's analysis—when the facts could not be construed as showing a completed intended offense. When the facts could be so construed, the only practical solution is to take out the language referring to the section 15.01(a) requirement negated by section 15.01(c).

## CPJC 52.4 Impossibility

The Committee considered whether Texas criminal law, in an attempt prosecution, attaches any legal significance to evidence that the defendant, by doing what the defendant has set out to do, could not commit the intended offense. It also considered whether and how juries should be instructed on this law addressing the significance of evidence of such “impossibility” of success.

Traditional criminal law is that legal impossibility but not factual impossibility precludes conviction for attempt. *See* Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 932 (3d ed. 1982). Courts have experienced considerable difficulty with what might appear to be the rather simple distinction between the two kinds of impossibility. *See* Wayne R. LaFave, *Substantive Criminal Law* § 11.5 (2d ed. 2003).

There are very unusual situations in which many courts and commentators agree there should be no liability for attempt. Discussions using impossibility terminology sometimes refer to these cases as involving “pure legal impossibility” or “true legal impossibility.” *United States v. Farner*, 251 F.3d 510, 512 n.2 (5th Cir. 2001). These involve situations in which no crime would be committed even if both (1) the defendant did everything he intended to do and (2) all the factual circumstances were as the defendant believed them to be.

The Model Penal Code defines attempt as committed when—with the required culpable mental state—a defendant “does . . . anything that, under the circumstances as he believes them to be, is . . . a substantial step in a course of conduct planned to culminate in [the] commission of the crime.” Model Penal Code § 5.01(1)(c) (Official Edition 1985). This would permit conviction in all impossibility cases except those involving pure legal impossibility.

**Texas Case Law.** The major Texas case law consists of a plurality portion (Part II) of the deciding opinion in *Lawhorn v. State*, 898 S.W.2d 886 (Tex. Crim. App. 2005) (a burglary case) and the unanimous opinion of the court in *Chen v. State*, 42 S.W.3d 926 (Tex. Crim. App. 2001) (an attempt case).

The *Lawhorn* plurality discussion suggested legal impossibility might in some situations prevent conviction for attempt and perhaps some other Texas crimes such as burglary. *Chen* held the facts showed only factual impossibility, defined as “a situation in which the actor’s objective was forbidden by the criminal law, although the actor was prevented from reaching that objective due to circumstances unknown to him.” *Chen*, 42 S.W.3d at 926–30 (quoting 21 Am. Jur. 2d *Criminal Law* § 178). This demonstration of factual impossibility, *Chen* held, did not render the evidence insufficient to support a conviction for attempt.

*Chen* also—ignoring the plurality nature of the *Lawhorn* discussion—asserted: “[W]e stated [in *Lawhorn*] that legal impossibility was a valid defense, while factual impossibility was not.” *Chen*, 42 S.W.3d at 929. *Chen* added:

Legal impossibility exists “where the act if completed would not be a crime, although what the actor intends to accomplish would be a crime.” *Lawhorn*, 898 S.W.2d at 891. It has also been described as “existing [when] what the actor intends to do would not constitute a crime, or at least the crime charged.” *Id.*

*Chen*, 42 S.W.3d at 929. As to the accuracy of the plurality statement in *Lawhorn* that legal impossibility is a valid defense, *Chen* commented that the case before it involved only factual impossibility and thus “[w]e find it unnecessary to dispose of the legal impossibility doctrine at this time.” *Chen*, 42 S.W.3d at 929.

*Chen* appeared to hold that factual impossibility is never a defense and thus never renders otherwise adequate evidence of attempt insufficient. It did not, however, address the assumption in *Weeks v. State*, 834 S.W.2d 559 (Tex. App.—Eastland 1992, pet. ref’d), that the requirement of an act “that tends . . . to effect the commission of the offense intended” means the act must be one that “could have” effected the commission of the intended offense. *Weeks v. Scott*, 55 F.3d 1059 (5th Cir. 1995), accepted that this was Texas law.

Under *Weeks*, the state must show in an attempt prosecution that success was at least possible in some sense. Factual impossibility under *Weeks* is not only a defense but necessarily establishes the state failed to show the defendant’s conduct, if pursued, could result in successful commission of the intended offense. *Chen*’s failure to disclaim this approach is puzzling and raises some question whether *Chen* firmly establishes that factual impossibility is irrelevant to guilt of attempt.

**Committee’s Position.** The members of the Committee could not agree on whether Texas law bars conviction for attempt in any situations that might be characterized as involving impossibility of some sort. The Committee was consequently unable to agree on any instructions to recommend if impossibility is a defense or otherwise bars conviction and if it sometimes presents jury issues. The instructions, therefore, do not address the matter. Nor do they reflect the *Weeks* opinions’ assumption that the state must prove some degree of the possibility of success.

**Possible Impossibility Approach Focusing on Intent.** The Committee considered a suggestion that *Chen* implicitly provided for an appropriate approach to impossibility scenarios.

In *Chen*, the court reviewed impossibility cases from other jurisdictions and then commented: “The cases illustrate that the defendant’s intent is the critical element in attempt offenses—not possible completion of the substantive offense.” *Chen*, 42 S.W.3d at 929–30, 930 n.2. This observation appears to have been intended to cover Texas as well as general law. Under *Chen*, then, “the critical element” in attempt under Texas law is “the defendant’s intent . . . —not possible completion of the substantive offense.”

The court in *Chen* next turned to the proof produced in support of the indictment’s allegation that the defendant Chen attempted to induce Julie Cirello, a child younger than eighteen years of age, to engage in sexual intercourse. This evidence proved “the critical element”—Chen’s intent. The court explained:

It is true that, as appellant claims, the actual offense of sexual performance by a child would have been impossible for appellant to *complete*; the complainant, Julie Cirello, did not physically exist. But completion of the crime was apparently possible to appellant. He had *specific intent* to commit the offense of sexual performance by a child . . . .

*Chen*, 42 S.W.3d at 930.

*Chen* clearly asked whether what the defendant set out to do would have been an offense if the facts had been as he assumed they were or if the factual situation had been as he assumed it was. It asked whether his objective would be a crime if he actually had sex with the person he had arranged to meet, if that person was—as Chen assumed—a child younger than eighteen years of age. Chen had the required “specific intent to commit [the offense of sexual performance by a child]” if he intended to induce a person he believed to be a child to engage in sexual intercourse.

Under this approach, the requirement of a specific intent to commit the target offense, properly defined, means a defendant cannot be convicted of attempt in so-called pure or true legal impossibility situations. No separate and confusing defensive doctrine of legal impossibility is necessary to assure this result.

**Implementing an “Intent” Approach.** An approach focusing on the required “specific intent to commit an offense” might be implemented by carefully defining the necessary culpable mental state. This might involve a definition along the following lines:

*Specific Intent to Commit [insert intended offense]*

A person has the specific intent to commit [insert intended offense] if the person has the conscious objective or desire to engage in conduct that would constitute the offense of [insert intended offense] if the circumstances were as the person believed them to be.

Under this approach, impossibility would preclude conviction only in “pure legal impossibility” situations. In other situations, there would be liability and no need to categorize each situation as involving legal or factual impossibility.

This approach would reject the interpretation in *Weeks* of “tends . . . to effect the commission of the offense intended.” In light of *Chen*, however, this abandonment of the *Weeks* approach is arguably appropriate. No significance should flow from a showing that the defendant’s planned conduct could not complete the intended offense if

that conduct would constitute the intended offense, if the situation were as the accused thought it to be.

**Committee’s Position Regarding Possible Impossibility Approach Focusing on Intent.** The Committee was not sufficiently convinced Texas law under *Chen* had incorporated this approach to justify including it in a pattern jury instruction. *Chen* was an evidence sufficiency case, and the court of criminal appeals has made clear analyses used by appellate courts for determining the sufficiency of evidence are not necessarily appropriate or sufficient for instructing juries.

Further, this reading of *Chen* implicitly assumes section 15.01(a) includes the substance of explicit language used in the statutory definition of solicitation. [Tex. Penal Code § 15.03\(a\)](#) (defining the offense as soliciting another “to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute the [offense]”). *Chen* did not support its use of the analysis described above in light of the absence in section 15.01(a) of section 15.03(a)-like language. The Committee was not confident the court would adhere to the apparent approach of *Chen* after considering the difference in language between sections 15.01(a) and 15.03(a).

## **CPJC 52.5    Defining Specific Intent to Commit Partially Strict Liability Offenses**

The Committee had little difficulty drafting a definition of specific intent to commit murder. It encountered more problems putting into jury-friendly and accurate words what is required to prove specific intent to commit a crime such as burglary of a building that itself imposes strict liability regarding some of its elements. Specifically, burglary of a building requires no awareness (1) that the place entered was a building, (2) that the building was not at the time open to the public, or (3) that the owner did not effectively consent to the entry.

The Committee was confident that specific intent to commit burglary of a building as required for attempted burglary of a building requires no more than intent (a conscious objective or desire) to enter a building and to commit a felony, theft, or assault. It was also confident that attempted burglary of a building requires proof that if the defendant were able to carry out his intent to enter, at that time both the building would not be open to the public and the owner would not have effectively consented. But the state need not prove the defendant intended these circumstances to exist or was aware that they would or might exist.

The Committee decided the least confusing way to put this was to add to the definition of the required specific intent a statement that the state must prove essentially that if the intent was carried out, the circumstances would exist. For burglary of a building, then, “specific intent to commit burglary of a building” is defined as follows:

A person acts with specific intent to commit burglary of a building when the person has the conscious objective or desire to—

1. enter a building and
2. commit a felony, theft, or assault.

In addition, it is necessary that—

1. the building was not open to the public and
2. the owner of the building did not effectively consent to the entry.

A proposal was made to add the further explanation:

Specific intent to commit a burglary of a building as required for attempted burglary of a building does not, however, require that the person intend either of these to be the case or be aware that these circumstances will exist when he made the intended entry.

The Committee concluded, however, that this would be more confusing than helpful. Thus, it did not add the further explanation.



## CPJC 52.6 Renunciation Defense to Guilt

A limited but complete affirmative defense to a charge of attempt is provided for by [Tex. Penal Code § 15.04\(a\)](#). Two aspects are worth comment.

First, the defense requires proof that the intended target offense was not committed. Further, this must be as a result of the defendant's renunciation of the effort to commit the target offense or some other "affirmative action" by the defendant.

Second, section 15.04(a) states the renunciation must be both "voluntary" and "complete." Section 15.04(c) specifies when renunciation is not "voluntary." The substance of section 15.04(c)'s criterion, however, would seem in part addressed to when renunciation is not "complete." Section 15.04(c)(2) essentially provides that a renunciation is not effective when it is motivated in whole or part "by a decision to postpone the criminal conduct until another time or to transfer the criminal act to another but similar objective or victim." Conceptually, this would seem to go not to whether the renunciation was "voluntary" but rather to whether it was "complete."

The Committee believed it was not free to deviate from the statutory framework's reliance on voluntariness, however, and the instruction therefore is phrased in section 15.04(c)(2)'s voluntary terminology.

The statute requires the abandonment be "under circumstances manifesting a voluntary and complete renunciation of his criminal objective." The Committee concluded the term *manifesting* was neither helpful nor necessary. It therefore rephrased the requirement in easier to understand terms.

**CPJC 52.7 Punishment Mitigation by Quasi-Renunciation**

Tex. Penal Code § 15.04(d) provides for submission at the penalty phase of the trial of what amounts to an issue of quasi-renunciation. A finding on this issue favorable to the defendant means “the punishment shall be one grade lower than that provided for the offense committed.”

The statute does not explicitly address placement or nature of the burden of persuasion. The language suggests the legislature intended this to be like an affirmative defense with the defendant having to establish it by a preponderance of the evidence. In *Scott v. State*, the court stated, “Renunciation of an inchoate offense under section 15.04(d) is a punishment-phase affirmative defense. The defendant has the burden of proving an affirmative defense by a preponderance of the evidence.” *Scott v. State*, No. 2-06-335-CR, 2007 WL 2460254 (Tex. App.—Fort Worth Aug. 31, 2007, no pet.) (not designated for publication) (citations omitted).

In the Committee’s view, the legislature intended the burden of persuasion to be on the defendant and that burden to be the preponderance of the evidence. The instruction is drafted to so provide.

In several ways, the section 15.04(d) quasi-defense is less demanding than section 15.04(a)’s complete defense of renunciation. First, it does not require proof that the intended offense was not committed. Second, the renunciation apparently need not be “voluntary and complete” as is required for the defense to guilt by section 15.04(a).

**CPJC 52.8 Instruction—Attempted Murder****INSTRUCTIONS OF THE COURT****Accusation**

*[Insert relevant accusation unit for specific offense. The following example is for when the underlying offense is murder under Texas Penal Code section 19.02(b)(1).]*

The state accuses the defendant of having committed the offense of attempted murder. Specifically, the accusation is that the defendant *[insert specific allegations, e.g., with the specific intent to commit the offense of murder, attempted to cause the death of [name] by shooting at [name] with a firearm and this act amounted to more than mere preparation that tended but failed to effect the commission of the murder intended]*.

**Relevant Statutes**

*[Insert relevant statutes and definitions units for charged offense. The following example is for a Texas Penal Code section 15.01 charge, in which the underlying offense was murder. See Texas Penal Code section 19.02(b)(1).]*

A person commits the offense of attempted murder if the person, with specific intent to commit the murder, does an act that tends but fails to effect the commission of the murder intended.

*[Include the following only if the evidence permits a conclusion that the offense was completed.]*

A person can be convicted of attempted murder even if the evidence proves the murder was actually committed.

*[Continue with the following.]*

A person commits the offense of murder if the person intentionally causes the death of an individual.

In order to prove that the defendant is guilty of attempted murder, the state must prove three elements beyond a reasonable doubt. The elements are that—

1. the defendant committed an act,

2. the act amounted to more than mere preparation and tended *[include unless the evidence could be construed by the jury as showing the intended offense was actually and successfully completed: but failed]* to effect the commission of a murder, and

3. the defendant had the specific intent to commit a murder.

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of attempted murder.

### **Definitions**

#### *Act*

“Act” means a bodily movement [, whether voluntary or involuntary,] [and includes speech].

#### *[Specific Intent/Intent] to Commit a Murder*

A person acts with the [specific] intent to commit a murder when the person has the conscious objective or desire to cause the death of another individual.

*[Additional definitions may be helpful, such as “murder” (Texas Penal Code section 19.02) and the culpable mental states (Texas Penal Code section 6.03).]*

### **Application of Law to Facts**

*[Include relevant application of law to facts unit for charged offense. The following example is for a Texas Penal Code section 15.01 charge, in which the underlying offense was murder.  
See Texas Penal Code section 19.02(b)(1).]*

You must decide whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, [name], in [county] County, Texas, on or about [date], committed the act of [insert specific allegations, e.g., shooting at [name] with a firearm];

2. the act of [insert specific allegations, e.g., shooting at [name] with a firearm] amounted to more than mere preparation and tended *[include unless the evidence could be construed by the jury as showing the intended offense*

*was actually and successfully completed: but failed] to effect the commission of the murder of [name]; and*

3. the defendant had the specific intent to *[insert specific allegations, e.g., cause the death of [name]]*.

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, then you must [find the defendant “guilty”/proceed to consider whether the defendant has proved the defense of renunciation].

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions. If the affirmative defense of renunciation should be considered, use the instruction at CPJC 52.9. If the issue of punishment mitigation by quasi-renunciation should be considered, use the punishment instruction and verdict form at CPJC 52.10.]*

### COMMENT

Criminal attempt is defined in [Tex. Penal Code § 15.01](#). This instruction is based on an indictment for attempted murder as defined by [Tex. Penal Code § 19.02\(b\)\(1\)](#). The court will need to modify this instruction depending on the accusation.

In cases where the evidence does not raise an issue that the defendant’s actions may have consisted of only speech (or where there is no voluntariness issue), the definition of “act” in the jury instructions should be appropriately tailored to the facts, i.e., “‘Act’ means a bodily movement.”

**CPJC 52.9 Instruction—Attempted Murder—Affirmative Defense of Renunciation (Texas Penal Code Section 15.04(a))**

*[Insert instructions for underlying offense.]*

**Renunciation**

You have heard evidence that the defendant renounced his criminal objective of committing the offense of attempted murder of [name] and avoided the commission of that intended offense.

**Relevant Statutes**

It is an affirmative defense to attempted murder that under circumstances manifesting a voluntary and complete renunciation of his criminal objective the defendant avoided commission of the offense attempted by abandoning his criminal conduct or, if abandonment was insufficient to avoid commission of the offense, by taking further affirmative action that prevented the commission of the offense attempted.

Renunciation is an affirmative defense. Therefore the defendant must prove, by a preponderance of the evidence, two elements. The elements are that—

1. he avoided commission of the intended offense either:
  - a. by abandoning his criminal conduct, or
  - b. if abandonment was insufficient to avoid commission of the offense, by taking further affirmative action that prevented the commission of the offense; and
2. the circumstances manifested a voluntary and complete renunciation of the defendant's criminal objective.

**Burden of Proof**

The burden is on the defendant to prove, by a preponderance of the evidence, that his conduct comes within the affirmative defense of renunciation.

**Definitions**

*Preponderance of the Evidence*

“Preponderance of the evidence” means the greater weight and degree of the credible evidence.

*Voluntary Renunciation of a Criminal Objective*

Renunciation is not voluntary if it is motivated in whole or in part—

1. by circumstances not present or apparent at the inception of the defendant's course of conduct that increase the probability of detection or apprehension or that make more difficult the accomplishment of the objective, or
2. by a decision to postpone the criminal conduct until another time or to transfer the criminal act to another but similar objective or victim.

**Application of Law to Facts**

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the defendant has proved, by a preponderance of the evidence, that his conduct comes within the affirmative defense of renunciation.

To decide the issue of renunciation, you must determine whether the defendant has proved, by a preponderance of the evidence, both of the following elements:

*[Select one of the following. If the evidence could not be construed by the jury as establishing that abandonment was insufficient to prevent commission of the offense, select the first option. If the evidence could be construed by the jury as establishing that abandonment was insufficient to prevent commission of the offense, select the second option.]*

1. The defendant avoided commission of the intended offense of attempted murder of [name] by abandoning his criminal conduct.

*[or]*

1. The defendant avoided commission of the intended offense of attempted murder of [name] either:
  - a. by abandoning his criminal conduct, or
  - b. if abandonment was insufficient to avoid commission of the intended offense, by taking further affirmative action that prevented the commission of that offense.

*[Continue with the following.]*

2. The circumstances made it plain that the defendant voluntarily and completely renounced his criminal objective to murder [*name*].

If you all agree that the defendant has proved, by a preponderance of the evidence, both of the elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of attempted murder, and you all agree the defendant has not proved, by a preponderance of the evidence, both of the elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

#### COMMENT

The affirmative defense of renunciation of criminal attempt is provided for in [Tex. Penal Code § 15.04\(a\)](#).



**CPJC 52.10 Instruction—Attempted Murder—Punishment Mitigation  
by Quasi-Renunciation (Texas Penal Code Section 15.04(d))**

You have found the defendant, [name], guilty of attempted murder. It is now your duty to assess punishment. Before you assess punishment, however, you must answer a preliminary question. The range of punishments from which you must choose the defendant's punishment depends on your answer to that question.

You must determine whether the defendant has proved, by a preponderance of the evidence, that he renounced his criminal objective.

**Relevant Statutes**

If the defendant proves that he renounced his criminal objective, this offense is punishable by—

1. a term of imprisonment for no less than two years and no more than ten years, or
2. a term of imprisonment for no less than two years and no more than ten years and a fine of no more than \$10,000.

If the defendant does not prove that he renounced his criminal objective, this offense is punishable by—

1. a term of imprisonment for no less than two years and no more than twenty years, or
2. a term of imprisonment for no less than two years and no more than twenty years and a fine of no more than \$10,000.

A defendant proves he renounced his criminal objective only if the defendant proves, by a preponderance of the evidence, two elements. The elements are that—

1. he abandoned his criminal conduct before the intended criminal offense was committed, and
2. he made substantial effort to prevent the commission of the intended offense.

You must all agree on whether the defendant has proved that he renounced his criminal objective.

**Burden of Proof**

The burden is on the defendant to prove, by a preponderance of the evidence, that he renounced his criminal objective.

**Definition***Preponderance of the Evidence*

“Preponderance of the evidence” means the greater weight and degree of the credible evidence.

**Application of Law to Facts**

You must determine whether the defendant has proved, by a preponderance of the evidence, both elements of renunciation of the criminal objective. The elements are that—

1. he abandoned his criminal conduct before the intended criminal offense was committed, and
2. he made substantial effort to prevent the commission of the intended offense.

You must all agree on whether the defendant has proved this before you may assess punishment. Your resolution of this issue will determine which of the two verdict forms you will use. If you all agree the defendant has proved that he renounced his criminal objective, use the first verdict form, titled “Verdict—Defendant Has Proved Renunciation of Criminal Objective.” If you all agree the defendant has not proved that he renounced his criminal objective, use the second verdict form, titled “Verdict—Defendant Has Not Proved Renunciation of Criminal Objective.”

If you all agree the defendant has proved, by a preponderance of the evidence, that he renounced his criminal objective, you are to determine and state in your verdict—

1. a term of imprisonment for no less than two years and no more than ten years, or
2. a term of imprisonment for no less than two years and no more than ten years and a fine of no more than \$10,000.

If you all agree the defendant has not proved, by a preponderance of the evidence, that he renounced his criminal objective, you are to determine and state in your verdict—

1. a term of imprisonment for no less than two years and no more than twenty years, or
2. a term of imprisonment for no less than two years and no more than twenty years and a fine of no more than \$10,000.

**VERDICT—DEFENDANT HAS PROVED RENUNCIATION OF  
CRIMINAL OBJECTIVE**

We, the jury, having found the defendant, [name], guilty of the offense of attempted murder, all agree that the defendant has proved that he renounced his criminal objective. We assess the defendant's punishment at: (select one)

- \_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ years and no fine.
- \_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ years and a fine of \$\_\_\_\_\_.

\_\_\_\_\_  
Foreperson of the Jury

\_\_\_\_\_  
Printed Name of Foreperson

**VERDICT—DEFENDANT HAS NOT PROVED RENUNCIATION OF  
CRIMINAL OBJECTIVE**

We, the jury, having found the defendant, [name], guilty of the offense of attempted murder, all agree that the defendant has not proved he renounced his criminal objective. We assess the defendant's punishment at: (select one)

- \_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ years and no fine.
- \_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ years and a fine of \$\_\_\_\_\_.

\_\_\_\_\_  
Foreperson of the Jury

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Printed Name of Foreperson

**COMMENT**

Punishment mitigation by quasi-renunciation is provided for in [Tex. Penal Code § 15.04\(d\)](#).

**CPJC 52.11 Instruction—Attempted Burglary of a Building****INSTRUCTIONS OF THE COURT****Accusation**

*[Insert relevant accusation unit for specific offense. The following example is for when the underlying offense was burglary of a building under Texas Penal Code section 30.02.]*

The state accuses the defendant of having committed the offense of attempted burglary of a building. Specifically, the accusation is that the defendant *[insert specific allegations, e.g., with the specific intent to commit the offense of burglary of a building, attempted to enter a building owned by [name] by climbing up the awning of the building, and this act amounted to more than mere preparation that tended but failed to effect the commission of the burglary intended]*.

**Relevant Statutes**

*[Insert relevant statutes and definitions units for charged offense. The following example is for a Texas Penal Code section 15.01 charge, in which the underlying offense was burglary of a building. See Texas Penal Code section 30.02.]*

A person commits the offense of attempted burglary of a building if the person, with specific intent to commit the burglary, does an act that tends but fails to effect the commission of the burglary intended.

A person commits the offense of burglary of a building if—

1. the person intentionally, knowingly, or recklessly enters a place;
  2. the place entered is a building;
  3. the building is not then open to the public;
  4. the owner of the building did not effectively consent to this entry;
- and
5. the defendant intends to commit a felony, theft, or an assault.

In order to prove that the defendant is guilty of attempted burglary of a building, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant committed an act,
2. the act amounted to more than mere preparation and tended *[include unless the evidence could be construed by the jury as showing the intended offense was actually and successfully completed: but failed]* to effect the commission of burglary of a building, and
3. the defendant had the specific intent to commit burglary of a building.

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of attempted burglary of a building.

### **Definitions**

#### *Act*

“Act” means a bodily movement [, whether voluntary or involuntary,] [and includes speech].

#### *Specific Intent to Commit Burglary of a Building*

A person acts with specific intent to commit burglary of a building when the person has the conscious objective or desire to—

1. enter a building; and
2. commit a felony, theft, or assault.

In addition, it is necessary that—

1. the building was not open to the public, and
2. the owner of the building did not effectively consent to the entry.

*[Include definitions of, and related to, those offenses the state contends were intended by the defendant.]*

### **Application of Law to Facts**

*[Include relevant application of law to facts unit for charged offense. The following example is for a Texas Penal Code section 15.01 charge, in which the underlying offense was burglary of a building. See Texas Penal Code section 30.02.]*

You must decide whether the state has proven, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, [name], in [county] County, Texas, on or about [date], committed the act of [insert specific allegations, e.g., climbing up the awning of a building owned by [name]];
2. the act of [insert specific allegations, e.g., climbing up the awning of a building owned by [name]] amounted to more than mere preparation and tended [include if the evidence could not be construed by the jury as showing the intended offense was actually and successfully completed: but failed] to effect the commission of burglary of the building; and
3. the defendant had the specific intent to commit burglary of a building.

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, then you must [find the defendant “guilty”/proceed to consider whether the defendant has proved the defense of renunciation].

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions. If the affirmative defense of renunciation should be considered, use the instruction at CPJC 52.12. If the issue of punishment mitigation by quasi-renunciation should be considered, use the punishment instruction and verdict form at CPJC 52.13.]*

### COMMENT

Criminal attempt is prohibited by and defined in [Tex. Penal Code § 15.01](#). This instruction is based on an indictment for attempted burglary of a building as defined by [Tex. Penal Code § 30.02](#). The court will need to modify this instruction depending on the accusation.

In cases where the evidence does not raise an issue that the defendant’s actions may have consisted of only speech (or where there is no voluntariness issue), the definition of “act” in the jury instructions should be appropriately tailored to the facts, i.e., “‘Act’ means a bodily movement.”

**CPJC 52.12 Instruction—Attempted Burglary of a Building—  
Affirmative Defense of Renunciation (Texas Penal Code  
Section 15.04(a))**

*[Insert instructions for underlying offense.]*

**Renunciation**

You have heard evidence that the defendant renounced his criminal objective of committing the offense of burglary of a building and avoided the commission of that intended offense.

**Relevant Statutes**

It is an affirmative defense to attempted burglary of a building that, under circumstances manifesting a voluntary and complete renunciation of his criminal objective, the defendant avoided commission of the offense attempted by abandoning his criminal conduct or, if abandonment was insufficient to avoid commission of the offense, by taking further affirmative action that prevented the commission of the offense attempted.

Renunciation is an affirmative defense. Therefore the defendant must prove, by a preponderance of the evidence, two elements. The elements are that—

1. he avoided commission of the intended offense either:
  - a. by abandoning his criminal conduct, or
  - b. if abandonment was insufficient to avoid commission of the offense, by taking further affirmative action that prevented the commission of the offense; and
2. the circumstances manifested a voluntary and complete renunciation of the defendant's criminal objective.

**Burden of Proof**

The burden is on the defendant to prove, by a preponderance of the evidence, that his conduct comes within the affirmative defense of renunciation.

**Definitions**

*Preponderance of the Evidence*

“Preponderance of the evidence” means the greater weight and degree of the credible evidence.



*Voluntary Renunciation of a Criminal Objective*

Renunciation is not voluntary if it is motivated in whole or in part—

1. by circumstances not present or apparent at the inception of the defendant's course of conduct that increase the probability of detection or apprehension or that make more difficult the accomplishment of the objective, or
2. by a decision to postpone the criminal conduct until another time or to transfer the criminal act to another but similar objective or victim.

**Application of Law to Facts**

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the defendant has proved, by a preponderance of the evidence, that his conduct comes within the affirmative defense of renunciation.

To decide the issue of renunciation, you must determine whether the defendant has proved, by a preponderance of the evidence, both of the following elements:

*[Select one of the following. If the evidence could not be construed by the jury as establishing that abandonment was insufficient to prevent commission of the offense, select the first option. If the evidence could be construed by the jury as establishing that abandonment was insufficient to prevent commission of the offense, select the second option.]*

1. The defendant avoided commission of the intended offense of burglary of a building by abandoning his criminal conduct.

*[or]*

1. The defendant avoided commission of the intended offense of burglary of a building either:
  - a. by abandoning his criminal conduct; or
  - b. if abandonment was insufficient to avoid commission of the intended offense, by taking further affirmative action that prevented the commission of that offense.

*[Continue with the following.]*

2. The circumstances made it plain that the defendant voluntarily and completely renounced his criminal objective of burglary of a building.

If you all agree that the defendant has proved, by a preponderance of the evidence, both of the elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of attempted burglary of a building, and you all agree the defendant has not proved, by a preponderance of the evidence, both of the elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

#### COMMENT

The affirmative defense of renunciation is provided for in [Tex. Penal Code § 15.04\(a\)](#).

**CPJC 52.13 Instruction—Attempted Burglary of a Building—  
Punishment Mitigation by Quasi-Renunciation (Texas Penal  
Code Section 15.04(d))**

You have found the defendant, [name], guilty of attempted burglary of a building. It is now your duty to assess punishment. Before you assess punishment, however, you must address a preliminary question. The range of punishments from which you must choose the defendant's punishment depends on your answer to that question.

You must determine whether the defendant has proved, by a preponderance of the evidence, that he renounced his criminal objective.

**Relevant Statutes**

If the defendant proves that he renounced his criminal objective, this offense is punishable by—

1. a term of imprisonment for no more than 180 days, or
2. a term of imprisonment for no more than 180 days and a fine of no more than \$2,000.

If the defendant does not prove that he renounced his criminal objective, this offense is punishable by—

1. a term of imprisonment for no more than one year, or
2. a term of imprisonment for no more than one year and a fine of no more than \$4,000.

A defendant proves he renounced his criminal objective only if the defendant proves, by a preponderance of the evidence, two elements. The elements are that—

1. he abandoned his criminal conduct before the intended criminal offense was committed, and
2. he made substantial effort to prevent the commission of the intended offense.

You must all agree on whether the defendant has proved that he renounced his criminal objective.

**Burden of Proof**

The burden is on the defendant to prove, by a preponderance of the evidence, that he renounced his criminal objective.

**Definition***Preponderance of the Evidence*

“Preponderance of the evidence” means the greater weight and degree of the credible evidence.

**Application of Law to Facts**

You must determine whether the defendant has proved, by a preponderance of the evidence, both elements of renunciation of the criminal objective. The elements are that—

1. he abandoned his criminal conduct before the intended criminal offense was committed, and
2. he made substantial effort to prevent the commission of the intended offense.

You must all agree on whether the defendant has proved this before you may assess punishment. Your resolution of this issue will determine which of the two verdict forms you will use. If you all agree the defendant has proved that he renounced his criminal objective, use the first verdict form, titled “Verdict—Defendant Has Proved Renunciation of Criminal Objective.” If you all agree the defendant has not proved that he renounced his criminal objective, use the second verdict form, titled “Verdict—Defendant Has Not Proved Renunciation of Criminal Objective.”

If you all agree the defendant has proved, by a preponderance of the evidence, that he renounced his criminal objective, you are to determine and state in your verdict—

1. a term of imprisonment for no more than 180 days, or
2. a term of imprisonment for no more than 180 days and a fine of no more than \$2,000.

If you all agree the defendant has not proved, by a preponderance of the evidence, that he renounced his criminal objective, you are to determine and state in your verdict—

1. a term of imprisonment for no more than one year, or

2. a term of imprisonment for no more than one year and a fine of no more than \$4,000.

**VERDICT—DEFENDANT HAS PROVED RENUNCIATION OF  
CRIMINAL OBJECTIVE**

We, the jury, having found the defendant, [name], guilty of the offense of attempted burglary of a building, all agree that the defendant has proved that he renounced his criminal objective. We assess the defendant's punishment at: (select one)

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ days and no fine.

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ days and a fine of \$ \_\_\_\_\_.

\_\_\_\_\_  
Foreperson of the Jury

\_\_\_\_\_  
Printed Name of Foreperson

**VERDICT—DEFENDANT HAS NOT PROVED RENUNCIATION OF  
CRIMINAL OBJECTIVE**

We, the jury, having found the defendant, [name], guilty of the offense of attempted burglary of a building, all agree that the defendant has not proved he renounced his criminal objective. We assess the defendant's punishment at: (select one)

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ days and no fine.

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ days and a fine of \$ \_\_\_\_\_.

\_\_\_\_\_  
Foreperson of the Jury

---

Printed Name of Foreperson

**COMMENT**

Punishment mitigation is provided for in [Tex. Penal Code § 15.04](#)(d).

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## CPJC 53.1 General Comments

The offense of engaging in organized criminal activity as set out in [Tex. Penal Code § 71.02\(a\)](#) is quite complex. Under this definition, there are multiple ways of committing the offense, presenting different questions concerning jury submission. Matters are complicated by other sections of chapter 71 of the Penal Code, as well.

Under [Tex. Penal Code § 71.02](#), guilt can be shown by proof that the defendant either committed a listed—or “covered”—offense or conspired to commit such an offense. In either case, the state must prove the defendant acted (in committing the offense or conspiring to commit it) “with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang.” [Tex. Penal Code § 71.02\(a\)](#).

The complexity of the offense of organized criminal activity as defined under chapter 71 argues strongly in favor of minimizing the risk of jury confusion by submitting only the law applicable to the case in light of the charging instrument and the proof produced at trial. To encourage this, the Committee wrote six instructions. The first three assume the state has relied on the defendant having acted “as a member of a criminal street gang.” CPJC [53.9](#) assumes the jury could convict only on proof the defendant committed a covered offense, CPJC [53.10](#) assumes the jury could convict only on proof the defendant conspired to commit a covered offense, and CPJC [53.11](#) assumes a considerably more complicated situation in which the jury could convict on proof the defendant either committed or conspired to commit a covered offense.

The final three instructions, CPJC [53.12](#) through CPJC [53.14](#), draw the same distinctions but assume the state has relied on the defendant having acted “with the intent to establish, maintain, or participate in a combination or in the profits of a combination.”

The covered offense used as the example in the instructions in this chapter is aggravated assault under [Tex. Penal Code § 22.02](#). Guidance for drafting instructions on assaultive offenses may be found in *Texas Criminal Pattern Jury Charges—Crimes against Persons & Property*, chapter 85.

### CPJC 53.2 Elements of Offense Committed “as a Member of a Criminal Street Gang”

Conviction under [Tex. Penal Code § 71.02](#) requires proof that the defendant committed or conspired to commit one or more crimes from a list of specific Penal Code offenses while (1) having the intent to establish, maintain, or participate in a combination or in the profits of a combination or (2) as a member of a criminal street gang. [Tex. Penal Code § 71.02\(a\)](#).

The court of criminal appeals considered the elements of engaging in organized criminal activity as those elements would appear in a hypothetically correct jury charge for indictments that invoke the “as a member of a criminal street gang” language. *Zuniga v. State*, [551 S.W.3d 729](#), 733 (Tex. Crim. App. 2018).

In *Zuniga*, the defendant was convicted of two counts of engaging in organized criminal activity and one count of capital murder. The intermediate court of appeals vacated his two convictions for engaging in organized criminal activity because the record “failed to show that he committed the shootings while possessing the intent to establish, maintain, or participate ‘as a member of a criminal street gang.’” *Zuniga*, [551 S.W.3d at 731](#).

After granting the state’s petition for discretionary review, the court of criminal appeals examined the language of section 71.02(a). *Zuniga* argued that the statute required proof of three elements: (1) that he had the intent to establish, maintain, or participate, (2) as a member of a criminal street gang, and (3) that he committed the murders of the two individuals. *Zuniga*, [551 S.W.3d at 734](#). The state countered this argument by contending that the hypothetically correct jury charge would only require proof of two elements: (1) while acting as a member of a criminal street gang, (2) *Zuniga* committed the two murders. *Zuniga*, [551 S.W.3d at 734](#).

The court of criminal appeals found that, as a matter of grammar and logic, the statute’s intent clause applies only to the phrase that immediately follows it—“in a combination or in the profits of a combination”—but not to the subsequent phrase “or as a member of a criminal street gang.” *Zuniga*, [551 S.W.3d at 735](#). Applying that interpretation of the statute, the court concluded that the hypothetically correct jury charge, when membership in a criminal street gang is alleged, would require proof that the defendant (1) as a member of a criminal street gang, (2) committed one of the offenses listed in [Tex. Penal Code § 71.02](#). *Zuniga*, [551 S.W.3d at 735](#).

Consistent with *Zuniga*, the instructions set out the elements of the criminal street gang manner of committing organized criminal activity as follows:

1. the defendant committed or conspired to commit a covered offense, and
2. the defendant did this as a member of a criminal street gang.

### CPJC 53.3 Submission on Alternative Theories

**Submission of Committing or Conspiring to Commit.** If the state relies on alternative theories—that the defendant either committed or conspired to commit a covered offense—the jury verdict must make clear on which theory the jury convicts because the grade of the offense differs depending on what theory the conviction rests. If the state has proved commission of the covered offense, the organized criminal activity offense is one category higher than that of the committed covered offense. [Tex. Penal Code § 71.02\(b\)](#). If the conviction of organized criminal activity is based on proof of conspiracy to commit a covered offense, the organized criminal activity offense is the same category as that of the committed covered offense the defendant conspired to commit. [Tex. Penal Code § 71.02\(c\)](#). See *Garza v. State*, 213 S.W.3d 338, 349 (Tex. Crim. App. 2007) (explaining grading scheme of section 71.02).

The instructions at CPJC 53.11 and CPJC 53.14, then, direct the jury to consider both possibilities and indicate in the verdict on which theory it convicts.

**Submission of Alternative Predicate Offenses.** The court of criminal appeals has held that jurors need not be unanimous concerning the predicate offense. See *O'Brien v. State*, 544 S.W.3d 376 (Tex. Crim. App. 2018). The commission of each predicate crime constitutes a different manner and means of committing the single offense of engaging in organized criminal activity. *O'Brien*, 544 S.W.3d at 379. Consequently, when the state alleges multiple predicate offenses and there is evidence supporting their submission to the jury, jurors can be instructed in the disjunctive regarding the predicate offenses. *O'Brien*, 544 S.W.3d at 379.

In *O'Brien*, the defendant was tried on one count of engaging in organized criminal activity. It was alleged that the defendant, with the “intent to establish, maintain, or participate in a combination or in the profits of a combination, committed second degree theft or second degree money laundering.” *O'Brien*, 544 S.W.3d at 379. The application paragraph of the jury charge presented the predicate offenses—theft and money laundering—in the disjunctive. *O'Brien*, 544 S.W.3d at 381.

On appeal, *O'Brien* argued that the application paragraph permitted a nonunanimous verdict as it pertained to the predicate offense. *O'Brien*, 544 S.W.3d at 382. After a lengthy analysis, the court of criminal appeals concluded that the “gravamen of the offense of engaging in organized criminal activity is a circumstance surrounding the conduct, namely the existence or creation of a combination that collaborates in carrying on criminal activities.” *O'Brien*, 544 S.W.3d at 394. The court went on to say that the legislative intent of the statute was that the underlying predicated offenses be treated as alternative manner and means of committing a single offense. *O'Brien*, 544 S.W.3d at 394. Alternative manner and means of the same offense may properly be submitted to the jury in the disjunctive. *O'Brien*, 544 S.W.3d at 394. The jury was not required to agree on which predicate offense was committed as a matter of due process

because the two predicate offenses alleged in this case were morally and conceptually equivalent. *O'Brien*, [544 S.W.3d at 394](#).

## CPJC 53.4 Relationship of the Conspiracy and the “Combination”

The statutes concerning organized criminal activity use the terms and concepts of “combinations” and “conspiracies” in an unclear manner. Under [Tex. Penal Code § 71.02\(a\)](#), the offense can be committed by conspiring to commit a covered crime. This must be done either “as a member of a criminal street gang” or “with the intent to establish, maintain, or participate in a combination or in the profits of a combination.” “Combination” is defined in [Tex. Penal Code § 71.01\(a\)](#) (requiring, among other things, collaboration of three or more persons) and “[c]onspires to commit” in [Tex. Penal Code § 71.01\(b\)](#) (requiring, among other things, agreement with one or more persons).

Some ways of committing the offense involve only one of the terms, as when the state maintains the defendant conspired to commit a covered offense as a member of a criminal street gang. Other ways involve both, as when the state maintains the defendant conspired to commit a covered offense with the intent to establish, maintain, or participate in a combination.

In the second category of cases, the state must, of course, prove the conspiracy occurred and the defendant was a party to the agreement constituting the conspiracy. With regard to the combination, in contrast, the state need only prove the defendant intended—apparently at the time of the agreement—to establish, maintain, or participate in a combination. It need not prove the defendant was a collaborating member of the combination. *Cf. Hart v. State*, 89 S.W.3d 61, 63 (Tex. Crim. App. 2002) (“[A] person need not be a member of a combination to be guilty of engaging in organized criminal activity.”). Perhaps—at least in some situations—it need not even prove that a combination actually existed; evidence may, for example, show a defendant intended the covered offense as a preliminary step in establishing a combination but establishment of the combination was never completed.

If the state’s theory is that the defendant’s liability is based on conspiring (rather than committing), the conspiracy must be one to commit a covered offense. A combination requires collaboration in carrying on “criminal activities,” but the criminal activities need not be related to covered offenses. Strangely, if the state’s theory is that the defendant acted with intent to participate in the profits of a combination, those profits—given the definition in [Tex. Penal Code § 71.01\(c\)](#)—must be proceeds from a covered offense.

Some provisions of chapter 71 suggest the legislature did not consistently use and distinguish between the terms *combinations* and *conspiracies*. For example, the renunciation defense provided for in [Tex. Penal Code § 71.05\(a\)](#) requires proof that the defendant “withdrew *from the combination*.” (emphasis added). The same is true of the quasi-defense proving for a reduction in punishment under sections 71.02(d) and 71.05(c). But no version of the offense requires the defendant have joined *the combi-*

*nation*. In some situations, the state must show the defendant joined *the conspiracy*. Should the defenses be applied to the latter situations?

[Tex. Penal Code § 71.03](#) provides that certain situations do not establish a defense. Sections 71.03(1), (2) and (4) refer to “the combination” but make no reference to the conspiracy. Sections 71.03(1) and (2) resemble provisions in the conspiracy statute, section 15.03(c), which suggests they may have been intended to apply to conspiracy insofar as it is incorporated into section 71.02. But it is difficult to read them as applicable to the conspiracy aspects of organized criminal activity given their phraseology.

Despite these problems, the statutory language is clear and the instructions are drafted in the statutory terminology. The Committee did not believe it could recommend deviating from the statutory language, however inconsistent that language might be.

**CPJC 53.5 Defining “Collaborate in Carrying on Criminal Activities”**

In *Nava v. State*, 379 S.W.3d 396, 421–22 (Tex. App.—Houston [14th Dist.] 2012), *aff’d*, 415 S.W.3d 289 (Tex. Crim. App. 2013) (review granted on other issues), the trial judge included in the instructions a definition of the term *collaborate in carrying on criminal activities* as it is used in Texas Penal Code section 71.01(a)’s definition of “combination.” The term was defined for the jury as “working together with a specified number of others in specified criminal activities.” Nava claimed error in giving this definition over the one sought by the defense, which would have defined the term as “to ‘work together in a continuing course of criminal activities.’”

Any definition, *Nava* concluded, should make clear that the required corroboration must involve an intention in at least one criminal activity other than the covered offense specified in the state’s claim. But it should not suggest the members of the claimed combination intended to indefinitely engage in criminal activities. The instruction actually given, the court commented, failed to adequately convey that the collaboration must be to engage in continuing criminal activity.

*Nava* also concluded that “‘collaborate in carrying on’ is not a phrase which has acquired a technical legal meaning that must be provided to the jury.” *Nava*, 379 S.W.3d at 421–22.

The Committee agreed with *Nava* that no definition is required. It further concluded any definition is more likely to confuse jurors than help them. Thus the Committee’s instructions contain no definition.

**CPJC 53.6 “Parties” Law**

The law of parties is relevant to at least two aspects of organized criminal liability.

First, in a prosecution relying on the theory that the defendant actually committed the covered offense, the state may rely on, and the jury may be instructed on, the theory that the defendant is liable under the law of parties. *McIntosh v. State*, 52 S.W.3d 196, 201 (Tex. Crim. App. 2001) (“We hold that party liability can support a conviction for engaging in organized criminal activity when, as in this case, the offense is alleged and proved as commission of the object offense.”); *Adi v. State*, 94 S.W.3d 124, 130 (Tex. App.—Corpus Christi 2002, pet. ref’d) (“[T]he trial judge erred in denying the State’s requested instruction on the law of parties.”) (citing *McIntosh*, 52 S.W.3d 196).

Second, in a prosecution relying on the theory that the defendant conspired to commit the covered offense, the state must prove the defendant himself committed an overt act. This act can be one that under the law of parties would create liability for at least the covered offense. *Otto v. State*, 95 S.W.3d 282 (Tex. Crim. App. 2003). Nothing in the case law suggests this should be addressed in the jury instructions.

If the state’s theory is that the defendant committed the covered offense, the second issue does not arise because there is no overt act requirement.

For further discussion on party liability, see chapter 5 of *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions*.



**CPJC 53.7 Affirmative Defense of Renunciation under Texas Penal Code Section 71.05**

The language of [Tex. Penal Code § 71.05\(a\)](#), creating and defining the affirmative defense of renunciation, suggests it might apply in any prosecution under section 71.02. The defense, however, requires proof that the defendant prevented the commission of the covered offense, so obviously it cannot apply to prosecutions in which the state proves the defendant committed the covered offense. Consequently it is limited to prosecutions undertaken on the theory that the defendant conspired to commit a covered offense. See CPJC [53.15](#) and the instruction at CPJC [53.16](#).

**CPJC 53.8    Quasi-Renunciation Defense and Punishment**

As is developed in CPJC 53.17 in this chapter, two statutory subsections provide for a punishment issue focusing on a defendant's claim that he withdrew "from the combination." [Tex. Penal Code §§ 71.02\(d\), 71.05\(c\)](#). This, unlike the affirmative defense to guilt, does not require prevention of the covered offense. On the other hand, it seems limited to situations in which the proof of guilt included proof the defendant joined "the combination." As discussed in CPJC 53.4, this is never actually required.

If the provisions are construed as focusing on withdrawal *from the conspiracy*, the punishment issue is obviously limited to those cases in which the state has proven guilt by showing the defendant conspired to commit the covered offense.

**CPJC 53.9**     **Instruction—Engaging in Organized Criminal Activity—  
Committing Covered Offense as Member of Criminal Street  
Gang**

**INSTRUCTIONS OF THE COURT**

**Accusation**

*[Insert relevant accusation unit for specific offense. The following example is for when the covered offense is aggravated assault under Texas Penal Code section 22.02.]*

The state accuses the defendant of having committed the offense of engaging in organized criminal activity. Specifically, the accusation is that the defendant, as a member of a criminal street gang, committed the offense of aggravated assault.

**Relevant Statutes**

*[Insert relevant statutes and definitions units for charged offense. The following example is for a Texas Penal Code section 71.02 charge, in which the covered offense is aggravated assault. See Texas Penal Code section 22.02.]*

A person commits the offense of engaging in organized criminal activity if, as a member of a criminal street gang, the person commits certain criminal offenses, including aggravated assault.

To prove that the defendant is guilty of organized criminal activity, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant committed the offense of aggravated assault, and
2. the defendant did this as a member of a criminal street gang.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of engaging in organized criminal activity.

## Definitions

### *Criminal Street Gang*

“Criminal street gang” means three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities.

### *Aggravated Assault*

Aggravated assault requires proof of two elements. The elements are that—

1. the defendant caused serious bodily injury to another; and
2. the defendant—

*[Include applicable mental state(s) as raised by the evidence.]*

- a. intended to cause bodily injury to that person;
- b. had knowledge that he would cause bodily injury to that person; or
- c. was reckless about whether he would cause bodily injury to that person.

### *Bodily Injury*

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

### *Serious Bodily Injury*

“Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

### *Intentionally Causing Bodily Injury*

A person intentionally causes bodily injury to another if it is the person’s conscious objective or desire to cause the bodily injury to another.

### *Knowingly Causing Bodily Injury*

A person knowingly causes bodily injury to another if the person is aware that the person’s conduct is reasonably certain to cause the bodily injury to another.

*Recklessly Causing Bodily Injury*

A person recklessly causes bodily injury to another if the person is aware of but consciously disregards a substantial and unjustifiable risk that the person's action will cause bodily injury to another. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

**Application of Law to Facts**

*[Include relevant application of law to facts unit for charged offense.*

*The following example is for a Texas Penal Code section 71.02 charge, in which the covered offense is aggravated assault.*

*See Texas Penal Code section 22.02.]*

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], committed aggravated assault; and
2. the defendant did this as a member of a criminal street gang.

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

**COMMENT**

Engaging in organized criminal activity is prohibited by and defined in [Tex. Penal Code § 71.02](#). The definition of “criminal street gang” is based on [Tex. Penal Code § 71.01\(d\)](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#). The definition of “bodily injury” is from [Tex. Penal Code § 1.07\(a\)\(8\)](#). The definition of “serious bodily injury” is from [Tex. Penal Code § 1.07\(a\)\(46\)](#).

This instruction is based on an indictment for, as a member of a criminal street gang, committing aggravated assault. Aggravated assault is prohibited by and defined in [Tex. Penal Code § 22.02](#). The definitions of the elements of aggravated assault are based on [Tex. Penal Code § 22.02](#) and the court of criminal appeals' holding in *Rodriguez v. State*, 538 S.W.3d 623 (Tex. Crim. App. 2018).

The court will need to modify the instruction depending on what the accusation charges.

**CPJC 53.10 Instruction—Engaging in Organized Criminal Activity—  
Conspiring to Commit Covered Offense as Member of  
Criminal Street Gang**

**INSTRUCTIONS OF THE COURT**

**Accusation**

*[Insert relevant accusation unit for specific offense. The following example is for when the covered offense is aggravated assault under Texas Penal Code section 22.02.]*

The state accuses the defendant of having committed the offense of engaging in organized criminal activity. Specifically, the accusation is that the defendant, as a member of a criminal street gang, conspired to commit the offense of aggravated assault.

**Relevant Statutes**

*[Insert relevant statutes and definitions units for charged offense. The following example is for a Texas Penal Code section 71.02 charge, in which the covered offense is aggravated assault. See Texas Penal Code section 22.02.]*

A person commits the offense of engaging in organized criminal activity if, as a member of a criminal street gang, the person conspires to commit one or more of certain criminal offenses, including aggravated assault.

To prove that the defendant is guilty of organized criminal activity, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant conspired to commit the offense of aggravated assault, and
2. the defendant did this as a member of a criminal street gang.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of engaging in organized criminal activity.

## Definitions

### *Criminal Street Gang*

“Criminal street gang” means three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities.

### *Conspired to Commit*

“Conspired to commit” means that a person agreed with one or more persons that they or one or more of them engage in conduct that would constitute the offense and that person and one or more of them performed an overt act in pursuance of that agreement.

An agreement constituting conspiring to commit conduct may be inferred from the acts of the parties.

### *Aggravated Assault*

Aggravated assault requires proof of two elements. The elements are that—

1. the defendant caused serious bodily injury to another; and
2. the defendant—

*[Include applicable mental state(s) as raised by the evidence.]*

- a. intended to cause bodily injury to that person;
- b. had knowledge that he would cause bodily injury to that person; or
- c. was reckless about whether he would cause bodily injury to that person.

### *Bodily Injury*

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

### *Serious Bodily Injury*

“Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.



*Intentionally Causing Bodily Injury*

A person intentionally causes bodily injury to another if it is the person's conscious objective or desire to cause the bodily injury to another.

*Knowingly Causing Bodily Injury*

A person knowingly causes bodily injury to another if the person is aware that the person's conduct is reasonably certain to cause the bodily injury to another.

*Recklessly Causing Bodily Injury*

A person recklessly causes bodily injury to another if the person is aware of but consciously disregards a substantial and unjustifiable risk that the person's action will cause bodily injury to another. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

**Application of Law to Facts**

*[Include relevant application of law to facts unit for charged offense.*

*The following example is for a Texas Penal Code section 71.02 charge, in which the covered offense is aggravated assault.*

*See Texas Penal Code section 22.02.]*

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], conspired to commit aggravated assault; and
2. the defendant did this as a member of a criminal street gang.

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must [find the defendant “guilty”/proceed to consider whether the defendant has proved the defense of renunciation].

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions. If the affirmative defense of renunciation should be considered, use the instruction at CPJC 53.16. If the issue of punishment mitigation by quasi-renunciation should be considered, use the punishment instruction and verdict form at CPJC 53.18 or CPJC 53.19.]*

### COMMENT

Engaging in organized criminal activity is prohibited by and defined in [Tex. Penal Code § 71.02](#). The definition of “criminal street gang” is based on [Tex. Penal Code § 71.01\(d\)](#). The definition of “conspires to commit” is based on [Tex. Penal Code § 71.01\(b\)](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#). The definition of “bodily injury” is from [Tex. Penal Code § 1.07\(a\)\(8\)](#). The definition of “serious bodily injury” is from [Tex. Penal Code § 1.07\(a\)\(46\)](#).

This instruction is based on an indictment for, as a member of a criminal street gang, conspiring to commit aggravated assault. Aggravated assault is prohibited by and defined in [Tex. Penal Code § 22.02](#). The definitions of the elements of aggravated assault are based on [Tex. Penal Code § 22.02](#) and the court of criminal appeals’ holding in *Rodriguez v. State*, [538 S.W.3d 623](#) (Tex. Crim. App. 2018).

The court will need to modify the instruction depending on what the accusation charges.

**CPJC 53.11 Instruction—Engaging in Organized Criminal Activity—  
Either Committing or Conspiring to Commit Covered  
Offense as Member of Criminal Street Gang and Verdict  
Form**

**INSTRUCTIONS OF THE COURT**

**Accusation**

*[Insert relevant accusation unit for specific offense. The following example is for when the covered offense is aggravated assault under Texas Penal Code section 22.02.]*

The state accuses the defendant of having committed the offense of engaging in organized criminal activity. Specifically, the accusation is that the defendant, as a member of a criminal street gang, committed or conspired to commit the offense of aggravated assault.

**Relevant Statutes**

*[Insert relevant statutes and definitions units for charged offense. The following example is for a Texas Penal Code section 71.02 charge, in which the covered offense is aggravated assault. See Texas Penal Code section 22.02.]*

A person commits the offense of engaging in organized criminal activity if, as a member of a criminal street gang, the person commits or conspires to commit one or more of certain criminal offenses, including aggravated assault.

To prove that the defendant is guilty of organized criminal activity, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant either:
  - a. committed the offense of aggravated assault, or
  - b. conspired to commit the offense of aggravated assault, and
2. the defendant did this as a member of a criminal street gang.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of engaging in organized criminal activity.

## Definitions

### *Criminal Street Gang*

“Criminal street gang” means three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities.

### *Conspired to Commit*

“Conspired to commit” means that a person agreed with one or more persons that they or one or more of them engage in conduct that would constitute the offense and that person and one or more of them performed an overt act in pursuance of that agreement.

An agreement constituting conspiring to commit conduct may be inferred from the acts of the parties.

### *Aggravated Assault*

Aggravated assault requires proof of two elements. The elements are that—

1. the defendant caused serious bodily injury to another; and
2. the defendant—

*[Include applicable mental state(s) as raised by the evidence.]*

- a. intended to cause bodily injury to that person;
- b. had knowledge that he would cause bodily injury to that person; or
- c. was reckless about whether he would cause bodily injury to that person.

### *Bodily Injury*

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

### *Serious Bodily Injury*

“Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

*Intentionally Causing Bodily Injury*

A person intentionally causes bodily injury to another if it is the person's conscious objective or desire to cause the bodily injury to another.

*Knowingly Causing Bodily Injury*

A person knowingly causes bodily injury to another if the person is aware that the person's conduct is reasonably certain to cause the bodily injury to another.

*Recklessly Causing Bodily Injury*

A person recklessly causes bodily injury to another if the person is aware of but consciously disregards a substantial and unjustifiable risk that the person's action will cause bodily injury to another. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

**Application of Law to Facts**

*[Include relevant application of law to facts unit for charged offense.*

*The following example is for a Texas Penal Code section 71.02 charge, in which the covered offense is aggravated assault.*

*See Texas Penal Code section 22.02.]*

First you must determine whether the state has proved, beyond a reasonable doubt, the two elements of organized criminal activity by committing aggravated assault. The elements of organized criminal activity by committing aggravated assault are that—

1. the defendant, in [county] County, Texas, on or about [date], committed aggravated assault; and
2. the defendant did this as a member of a criminal street gang.

You must all agree on elements 1 and 2 listed above. If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty” of organized criminal activity by committing aggravated assault and so indicate on the attached verdict form, titled “Verdict—Guilty of Organized Criminal Activity by Committing Aggravated Assault.”

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, or if you cannot agree on whether the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must then determine whether the state has proved, beyond a reasonable doubt, the two elements of organized criminal activity by conspiring to commit aggravated assault.

The elements of organized criminal activity by conspiring to commit aggravated assault are that—

1. the defendant, in [county] County, Texas, on or about [date], conspired to commit aggravated assault; and
2. the defendant did this as a member of a criminal street gang.

You must all agree on elements 1 and 2 listed above. If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty” of organized criminal activity by conspiring to commit aggravated assault and so indicate on the attached verdict form, titled “Verdict—Guilty of Organized Criminal Activity by Conspiring to Commit Aggravated Assault.”

If you all agree the state has failed to prove, beyond a reasonable doubt, either organized criminal activity by committing aggravated assault or organized criminal activity by conspiring to commit aggravated assault, you must find the defendant “not guilty.”

If you believe from the evidence, beyond a reasonable doubt, that the defendant is guilty of either organized criminal activity by committing aggravated assault on the one hand or organized criminal activity by conspiring to commit aggravated assault on the other hand, but you have a reasonable doubt as to which offense he is guilty of, then you must resolve that doubt in the defendant’s favor and find him guilty of organized criminal activity by conspiring to commit aggravated assault.

If you have a reasonable doubt as to whether the defendant is guilty of any offense defined in this instruction, you must find the defendant “not guilty.”

### **VERDICT—GUILTY OF ORGANIZED CRIMINAL ACTIVITY BY COMMITTING AGGRAVATED ASSAULT**

We, the jury, find the defendant, [name], guilty of organized criminal activity by committing aggravated assault, as charged in the indictment.

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Foreperson of the Jury

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Printed Name of Foreperson

**VERDICT—GUILTY OF ORGANIZED CRIMINAL ACTIVITY BY  
CONSPIRING TO COMMIT AGGRAVATED ASSAULT**

We, the jury, find the defendant, [*name*], guilty of organized criminal activity by conspiring to commit aggravated assault, as charged in the indictment.

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Foreperson of the Jury

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Printed Name of Foreperson

**VERDICT—NOT GUILTY**

We, the jury, find the defendant, [*name*], not guilty.

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Foreperson of the Jury

---

Printed Name of Foreperson

**COMMENT**

Engaging in organized criminal activity is prohibited by and defined in [Tex. Penal Code § 71.02](#). The definition of “criminal street gang” is based on [Tex. Penal Code § 71.01\(d\)](#). The definition of “conspires to commit” is based on [Tex. Penal Code § 71.01\(b\)](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#). The definition of “bodily injury” is from [Tex. Penal Code § 1.07\(a\)\(8\)](#). The definition of “serious bodily injury” is from [Tex. Penal Code § 1.07\(a\)\(46\)](#).

This instruction is based on an indictment for, as a member of a criminal street gang, committing or conspiring to commit aggravated assault. Aggravated assault is prohibited by and defined in [Tex. Penal Code § 22.02](#). The definitions of the elements of aggravated assault are based on [Tex. Penal Code § 22.02](#) and the court of criminal appeals' holding in *Rodriguez v. State*, [538 S.W.3d 623](#) (Tex. Crim. App. 2018).

The court will need to modify the instruction depending on what the accusation charges.



**CPJC 53.12** Instruction—Engaging in Organized Criminal Activity—  
Committing Covered Offense to Participate in Combination

**INSTRUCTIONS OF THE COURT**

**Accusation**

*[Insert relevant accusation unit for specific offense. The following example is for when the covered offense is aggravated assault under Texas Penal Code section 22.02.]*

The state accuses the defendant of having committed the offense of engaging in organized criminal activity. Specifically, the accusation is that the defendant, with the intent to establish, maintain, or participate in a combination or in the profits of a combination, committed the offense of aggravated assault.

**Relevant Statutes**

*[Insert relevant statutes and definitions units for charged offense. The following example is for a Texas Penal Code section 71.02 charge, in which the covered offense is aggravated assault. See Texas Penal Code section 22.02.]*

A person commits the offense of engaging in organized criminal activity if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination, the person commits one or more of certain criminal offenses, including aggravated assault.

To prove that the defendant is guilty of organized criminal activity, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant committed the offense of aggravated assault; and
2. the defendant did this with the intent to establish, maintain, or participate in a combination or in the profits of a combination.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of engaging in organized criminal activity.

## Definitions

### *Intent to Establish, Maintain, or Participate in a Combination or in the Profits of a Combination*

A person acts with “intent to establish, maintain, or participate in a combination, or in the profits of a combination” if the person has the conscious objective or desire to establish, maintain, or participate in a combination or in the profits of a combination.

### *Combination*

“Combination” means three or more persons who collaborate in carrying on criminal activities.

*[Insert the following if raised by the evidence.]*

A combination may exist although the participants may not know each other’s identities.

*[Insert the following if raised by the evidence.]*

A combination may exist although membership in the combination changes from time to time.

*[Insert the following if raised by the evidence.]*

A combination may exist although the participants stand in a wholesaler-retailer or other arm’s-length relationship in illicit distribution operations.

### *Profits*

“Profits” means property constituting or derived from any proceeds obtained, directly or indirectly, from *[insert offenses from Texas Penal Code section 71.02(a) raised by the evidence]*.

### *Aggravated Assault*

Aggravated assault requires proof of two elements. The elements are that—

1. the defendant caused serious bodily injury to another; and
2. the defendant—

*[Include applicable mental state(s) as raised by the evidence.]*

- a. intended to cause bodily injury to that person;
- b. had knowledge that he would cause bodily injury to that person; or
- c. was reckless about whether he would cause bodily injury to that person.

### *Bodily Injury*

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

### *Serious Bodily Injury*

“Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

### *Intentionally Causing Bodily Injury*

A person intentionally causes bodily injury to another if it is the person’s conscious objective or desire to cause the bodily injury to another.

### *Knowingly Causing Bodily Injury*

A person knowingly causes bodily injury to another if the person is aware that the person’s conduct is reasonably certain to cause the bodily injury to another.

### *Recklessly Causing Bodily Injury*

A person recklessly causes bodily injury to another if the person is aware of but consciously disregards a substantial and unjustifiable risk that the person’s action will cause bodily injury to another. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.

## **Application of Law to Facts**

*[Include relevant application of law to facts unit for charged offense.*

*The following example is for a Texas Penal Code section 71.02 charge, in which the covered offense is aggravated assault.*

*See Texas Penal Code section 22.02.]*

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], committed aggravated assault; and
2. the defendant did this with the intent to establish, maintain, or participate in a combination or in the profits of a combination.

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

Engaging in organized criminal activity is prohibited by and defined in [Tex. Penal Code § 71.02](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#). The definition of “bodily injury” is from [Tex. Penal Code § 1.07\(a\)\(8\)](#). The definition of “serious bodily injury” is from [Tex. Penal Code § 1.07\(a\)\(46\)](#). The definition of “combination” is from [Tex. Penal Code § 71.01\(a\)](#). The definition of “profits” is from [Tex. Penal Code § 71.01\(c\)](#).

This instruction is based on an indictment for, as a member of a combination, committing aggravated assault. Aggravated assault is prohibited by and defined in [Tex. Penal Code § 22.02](#). The definitions of the elements of aggravated assault are based on [Tex. Penal Code § 22.02](#) and the court of criminal appeals’ holding in *Rodriguez v. State*, 538 S.W.3d 623 (Tex. Crim. App. 2018).

The court will need to modify the instruction depending on what the accusation charges.

**CPJC 53.13 Instruction—Engaging in Organized Criminal Activity—  
Conspiring to Commit Covered Offense to Participate in  
Combination**

**INSTRUCTIONS OF THE COURT**

**Accusation**

*[Insert relevant accusation unit for specific offense. The following example is for when the covered offense is aggravated assault under Texas Penal Code section 22.02.]*

The state accuses the defendant of having committed the offense of engaging in organized criminal activity. Specifically, the accusation is that the defendant, with the intent to establish, maintain, or participate in a combination or in the profits of a combination, conspired to commit the offense of aggravated assault.

**Relevant Statutes**

*[Insert relevant statutes and definitions units for charged offense. The following example is for a Texas Penal Code section 71.02 charge, in which the covered offense is aggravated assault. See Texas Penal Code section 22.02.]*

A person commits the offense of engaging in organized criminal activity if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination, the person conspires to commit one or more of certain criminal offenses, including aggravated assault.

To prove that the defendant is guilty of organized criminal activity, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant conspired to commit the offense of aggravated assault; and
2. the defendant did this with the intent to establish, maintain, or participate in a combination or in the profits of a combination.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of engaging in organized criminal activity.

## Definitions

### *Intent to Establish, Maintain, or Participate in a Combination or in the Profits of a Combination*

A person acts with “intent to establish, maintain, or participate in a combination, or in the profits of a combination” if the person has the conscious objective or desire to establish, maintain, or participate in a combination or in the profits of a combination.

### *Combination*

“Combination” means three or more persons who collaborate in carrying on criminal activities.

*[Insert the following if raised by the evidence.]*

A combination may exist although the participants may not know each other’s identities.

*[Insert the following if raised by the evidence.]*

A combination may exist although membership in the combination changes from time to time.

*[Insert the following if raised by the evidence.]*

A combination may exist although the participants stand in a wholesaler-retailer or other arm’s-length relationship in illicit distribution operations.

### *Conspired to Commit*

“Conspired to commit” means that a person agreed with one or more persons that they or one or more of them engage in conduct that would constitute the offense and that person and one or more of them performed an overt act in pursuance of that agreement.

An agreement constituting conspiring to commit conduct may be inferred from the acts of the parties.

### *Profits*

“Profits” means property constituting or derived from any proceeds obtained, directly or indirectly, from *[insert offenses from Texas Penal Code section 71.02(a) raised by the evidence]*.

*Aggravated Assault*

Aggravated assault requires proof of two elements. The elements are that—

1. the defendant caused serious bodily injury to another; and
2. the defendant—

*[Include applicable mental state(s) as raised by the evidence.]*

- a. intended to cause bodily injury to that person;
- b. had knowledge that he would cause bodily injury to that person; or
- c. was reckless about whether he would cause bodily injury to that person.

*Bodily Injury*

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

*Serious Bodily Injury*

“Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

*Intentionally Causing Bodily Injury*

A person intentionally causes bodily injury to another if it is the person’s conscious objective or desire to cause the bodily injury to another.

*Knowingly Causing Bodily Injury*

A person knowingly causes bodily injury to another if the person is aware that the person’s conduct is reasonably certain to cause the bodily injury to another.

*Recklessly Causing Bodily Injury*

A person recklessly causes bodily injury to another if the person is aware of but consciously disregards a substantial and unjustifiable risk that the person’s action will cause bodily injury to another. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care

that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

*[Insert the following if raised by the evidence.]*

### **No Defenses**

If the evidence proves all elements of organized criminal activity, it is no defense that—

1. one or more members of the combination are not criminally responsible for the object offense;
2. one or more members of the combination have been acquitted, have not been prosecuted or convicted, have been convicted of a different offense, or are immune from prosecution;
3. a person has been charged with, acquitted, or convicted of any offense listed in subsection (a) of Texas Penal Code section 71.02; or
4. once the initial combination of three or more persons is formed, there is a change in the number or identity of persons in the combination, as long as two or more persons remain in the combination and are involved in a continuing course of conduct constituting an offense under applicable law.

### **Application of Law to Facts**

*[Include relevant application of law to facts unit for charged offense.  
The following example is for a Texas Penal Code section 71.02  
charge, in which the covered offense is aggravated assault.  
See Texas Penal Code section 22.02.]*

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], conspired to commit aggravated assault; and
2. the defendant did this with the intent to establish, maintain, or participate in a combination or in the profits of a combination.

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, you must find the defendant “not guilty.”



If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must [find the defendant “guilty”/proceed to consider whether the defendant has proved the defense of renunciation].

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions. If the affirmative defense of renunciation should be considered, use the instruction at CPJC 53.16. If the issue of punishment mitigation by quasi-renunciation should be considered, use the punishment instruction and verdict form at CPJC 53.18 or CPJC 53.19.]*

### COMMENT

Engaging in organized criminal activity is prohibited by and defined in [Tex. Penal Code § 71.02](#). The definition of “conspires to commit” is based on [Tex. Penal Code § 71.01\(b\)](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#). The definition of “bodily injury” is from [Tex. Penal Code § 1.07\(a\)\(8\)](#). The definition of “serious bodily injury” is from [Tex. Penal Code § 1.07\(a\)\(46\)](#). The definition of “combination” is from [Tex. Penal Code § 71.01\(a\)](#). The definition of “profits” is from [Tex. Penal Code § 71.01\(c\)](#).

This instruction is based on an indictment for, as a member of a combination, conspiring to commit aggravated assault. Aggravated assault is prohibited by and defined in [Tex. Penal Code § 22.02](#). The definitions of the elements of aggravated assault are based on [Tex. Penal Code § 22.02](#) and the court of criminal appeals’ holding in *Rodriguez v. State*, 538 S.W.3d 623 (Tex. Crim. App. 2018).

The court will need to modify the instruction depending on what the accusation charges.

**CPJC 53.14 Instruction—Engaging in Organized Criminal Activity—  
Committing or Conspiring to Commit Covered Offense to  
Participate in Combination and Verdict Form**

**INSTRUCTIONS OF THE COURT**

**Accusation**

*[Insert relevant accusation unit for specific offense. The following example is for when the covered offense is aggravated assault under Texas Penal Code section 22.02.]*

The state accuses the defendant of having committed the offense of engaging in organized criminal activity. Specifically, the accusation is that the defendant, with the intent to establish, maintain, or participate in a combination or in the profits of a combination, committed or conspired to commit the offense of aggravated assault.

**Relevant Statutes**

*[Insert relevant statutes and definitions units for charged offense. The following example is for a Texas Penal Code section 71.02 charge, in which the covered offense is aggravated assault. See Texas Penal Code section 22.02.]*

A person commits the offense of engaging in organized criminal activity if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination, the person commits or conspires to commit one or more of certain criminal offenses, including aggravated assault.

To prove that the defendant is guilty of organized criminal activity, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant either:
  - a. committed the offense of aggravated assault, or
  - b. conspired to commit the offense of aggravated assault; and
2. the defendant did this with the intent to establish, maintain, or participate in a combination or in the profits of a combination.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of engaging in organized criminal activity.

**Definitions***Intent to Establish, Maintain, or Participate in a Combination or in the Profits of a Combination*

A person acts with “intent to establish, maintain, or participate in a combination, or in the profits of a combination” if the person has the conscious objective or desire to establish, maintain, or participate in a combination or in the profits of a combination.

*Combination*

“Combination” means three or more persons who collaborate in carrying on criminal activities.

*[Insert the following if raised by the evidence.]*

A combination may exist although the participants may not know each other’s identities.

*[Insert the following if raised by the evidence.]*

A combination may exist although membership in the combination changes from time to time.

*[Insert the following if raised by the evidence.]*

A combination may exist although the participants stand in a wholesaler-retailer or other arm’s-length relationship in illicit distribution operations.

*Conspired to Commit*

“Conspired to commit” means that a person agreed with one or more persons that they or one or more of them engage in conduct that would constitute the offense and that person and one or more of them performed an overt act in pursuance of that agreement.

An agreement constituting conspiring to commit conduct may be inferred from the acts of the parties.

*Profits*

“Profits” means property constituting or derived from any proceeds obtained, directly or indirectly, from *[insert those offenses from Texas Penal Code section 71.02(a) raised by the evidence]*.

*Aggravated Assault*

Aggravated assault requires proof of two elements. The elements are that—

1. the defendant caused serious bodily injury to another; and
2. the defendant—

*[Include applicable mental state(s) as raised by the evidence.]*

- a. intended to cause bodily injury to that person;
- b. had knowledge that he would cause bodily injury to that person; or
- c. was reckless about whether he would cause bodily injury to that person.

*Bodily Injury*

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

*Serious Bodily Injury*

“Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

*Intentionally Causing Bodily Injury*

A person intentionally causes bodily injury to another if it is the person’s conscious objective or desire to cause the bodily injury to another.

*Knowingly Causing Bodily Injury*

A person knowingly causes bodily injury to another if the person is aware that the person’s conduct is reasonably certain to cause the bodily injury to another.

*Recklessly Causing Bodily Injury*

A person recklessly causes bodily injury to another if the person is aware of but consciously disregards a substantial and unjustifiable risk that the person's action will cause bodily injury to another. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

**Application of Law to Facts**

*[Include relevant application of law to facts unit for charged offense.*

*The following example is for a Texas Penal Code section 71.02 charge, in which the covered offense is aggravated assault.*

*See Texas Penal Code section 22.02.]*

First you must determine whether the state has proved, beyond a reasonable doubt, the two elements of organized criminal activity by committing aggravated assault. The elements of organized criminal activity by committing aggravated assault are that—

1. the defendant, in [county] County, Texas, on or about [date], committed aggravated assault; and
2. the defendant did this with the intent to establish, maintain, or participate in a combination or in the profits of a combination.

You must all agree on elements 1 and 2 listed above. If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty” of organized criminal activity by committing aggravated assault and so indicate on the attached verdict form, titled “Verdict—Guilty of Organized Criminal Activity by Committing Aggravated Assault.”

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of elements 1 and 2 listed above, or if you cannot agree on whether the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must next determine whether the state has proved, beyond a reasonable doubt, the two elements of organized criminal activity by conspiring to commit aggravated assault.

The elements of organized criminal activity by conspiring to commit aggravated assault are that—

1. the defendant, in [county] County, Texas, on or about [date], conspired to commit aggravated assault; and
2. the defendant did this with the intent to establish, maintain, or participate in a combination or in the profits of a combination.

You must all agree on elements 1 and 2 listed above. If you all agree the state has proved, beyond a reasonable doubt, both of the two elements listed above, you must find the defendant “guilty” of organized criminal activity by conspiring to commit aggravated assault and so indicate on the attached verdict form, titled “Verdict—Guilty of Organized Criminal Activity by Conspiring to Commit Aggravated Assault.”

If you all agree the state has failed to prove, beyond a reasonable doubt, either organized criminal activity by committing aggravated assault or organized criminal activity by conspiring to commit aggravated assault, you must find the defendant “not guilty.”

If you believe from the evidence, beyond a reasonable doubt, that the defendant is guilty of either organized criminal activity by committing aggravated assault on the one hand or organized criminal activity by conspiring to commit aggravated assault on the other hand, but you have a reasonable doubt which offense he is guilty of, then you must resolve that doubt in the defendant’s favor and find him guilty of organized criminal activity by conspiring to commit aggravated assault.

If you have a reasonable doubt as to whether the defendant is guilty of any offense defined in this instruction, you must find the defendant “not guilty.”

**VERDICT—GUILTY OF ORGANIZED CRIMINAL ACTIVITY BY  
COMMITTING AGGRAVATED ASSAULT**

We, the jury, find the defendant, [name], guilty of organized criminal activity by committing aggravated assault, as charged in the indictment.

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Foreperson of the Jury

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Printed Name of Foreperson

**VERDICT—GUILTY OF ORGANIZED CRIMINAL ACTIVITY BY  
CONSPIRING TO COMMIT AGGRAVATED ASSAULT**

We, the jury, find the defendant, [name], guilty of organized criminal activity by conspiring to commit aggravated assault, as charged in the indictment.

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Foreperson of the Jury

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Printed Name of Foreperson

**VERDICT—NOT GUILTY**

We, the jury, find the defendant, [name], not guilty.

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Foreperson of the Jury

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Printed Name of Foreperson

**COMMENT**

Engaging in organized criminal activity is prohibited by and defined in [Tex. Penal Code § 71.02](#). The definition of “conspires to commit” is based on [Tex. Penal Code § 71.01\(b\)](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#). The definition of “bodily injury” is from [Tex. Penal Code § 1.07\(a\)\(8\)](#). The definition of “serious bodily injury” is from [Tex. Penal Code § 1.07\(a\)\(46\)](#). The definition of “combination” is from [Tex. Penal Code § 71.01\(a\)](#). The definition of “profits” is from [Tex. Penal Code § 71.01\(c\)](#).

This instruction is based on an indictment for, as a member of a combination, committing or conspiring to commit aggravated assault. Aggravated assault is prohibited by and defined in [Tex. Penal Code § 22.02](#). The definitions of the elements of aggravated assault are based on [Tex. Penal Code § 22.02](#) and the court of criminal appeals’ holding in *Rodriguez v. State*, 538 S.W.3d 623 (Tex. Crim. App. 2018).

The court will need to modify the instruction depending on what the accusation charges.

**CPJC 53.15 Affirmative Defense of Renunciation under Texas Penal Code Section 71.05(a)**

The instruction at CPJC 53.16 should be considered for submission only if the defendant was convicted on the basis of an allegation and proof that the defendant committed the organized criminal activity by conspiring to commit a covered offense. If the defendant was convicted on the basis of an allegation and proof that the defendant actually committed a covered offense, obviously the defendant cannot prove he prevented the commission of that offense. See [Tex. Penal Code § 71.05\(a\)](#).

The terminology of the defense presents a conceptual problem. It requires proof of withdrawal “from the combination.” Under [Tex. Penal Code § 71.02\(a\)](#), however, joining the combination is not an element of the offense. The defendant must be proved to have intended to establish, maintain, or participate in a combination or in the profits of a combination. The definition of “conspires to commit” in section 71.01(b) implicitly requires proof that the defendant in effect joined a conspiracy from which he could conceivably withdraw.

Almost certainly, the legislature intended—at least for purposes of the renunciation defense—that the conspiracy and the combination be the same. The defense could be put in terms of withdrawal from the conspiracy without deviating from the apparent legislative intent.

Despite this conceptual problem, the instruction uses the statutory terminology. The Committee believed the conceptual problem would seldom, if ever, create a risk of jury confusion.



**CPJC 53.16 Instruction—Engaging in Organized Criminal Activity—  
Guilt-Innocence Renunciation Affirmative Defense**

*[Insert instructions for underlying offense.]*

**Renunciation**

You have heard evidence that the defendant renounced his criminal objective of committing the offense of aggravated assault and avoided the commission of that intended offense.

**Relevant Statutes**

It is an affirmative defense to organized criminal activity that under circumstances manifesting a voluntary and complete renunciation of his criminal objective the defendant withdrew from the combination before commission of the intended offense and took further affirmative action that avoided commission of the offense.

Renunciation is an affirmative defense. Therefore the defendant must prove, by a preponderance of the evidence, three elements. The elements are that—

1. the defendant withdrew from the combination before commission of the intended offense,
2. the circumstances manifested a voluntary and complete renunciation of the defendant's criminal objective, and
3. the defendant took further affirmative action that prevented the commission of the intended offense.

**Burden of Proof**

The burden is on the defendant to prove, by a preponderance of the evidence, that he comes within the affirmative defense of renunciation.

**Definitions***Preponderance of the Evidence*

“Preponderance of the evidence” means the greater weight and degree of the credible evidence.

*Voluntary Renunciation of a Criminal Objective*

Renunciation of a criminal objective is not voluntary if it is motivated in whole or in part—

1. by circumstances not present or apparent at the inception of the defendant's course of conduct that increase the probability of detection or apprehension or that make more difficult the accomplishment of the objective, or
2. by a decision to postpone the criminal conduct until another time or to transfer the criminal act to another but similar objective or victim.

**Application of Law to Facts**

If you have found that the state has proved the offense beyond a reasonable doubt, you must next determine whether the defendant has proved, by a preponderance of the evidence, that his conduct comes within the affirmative defense of renunciation.

To decide the issue of renunciation, you must determine whether the defendant has proved, by a preponderance of the evidence, three elements. The elements are that—

1. the defendant withdrew from the combination before commission of the intended offense of aggravated assault,
2. the circumstances manifested a voluntary and complete renunciation of the defendant's criminal objective, and
3. the defendant took further affirmative action that prevented the commission of the intended offense of aggravated assault.

You may decide that the defendant has proven elements 1, 2, and 3 by a preponderance of the evidence only if you all agree that the defendant has proven all of the elements. If you find that the defendant has proved, by a preponderance of the evidence, all of the elements listed above, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of organized criminal activity, and you all agree the defendant has not proved, by a preponderance of the evidence, all of the elements listed above, you must find the defendant "guilty."

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

#### COMMENT

The affirmative defense of renunciation is provided for in [Tex. Penal Code § 71.05\(a\)](#).

**CPJC 53.17 Punishment Mitigation—Quasi-Renunciation Issue under Texas Penal Code Sections 71.02(d) and 71.05(c)**

Provision is made for a determination of renunciation at the punishment stage in both sections 71.02(d) and 71.05(c) of the Texas Penal Code. The two provisions are not consistent. Section 71.02(d) provides the defendant must prove the matter by a preponderance of the evidence; section 71.05(c) does not address this.

More importantly, section 71.02(d) requires proof that the withdrawal be “in complete and voluntary renunciation of the offense.” Section 71.05(c) imposes no such requirement.

Section 71.05(c) refers to “a finding of renunciation under this subsection,” suggesting this subsection was intended to have some independent substantive effect.

The continued existence of the two provisions appears to be an accidental result of inconsistent actions by the Seventy-third Legislature. In 1977, the original chapter 71 scheme as then enacted provided for a punishment renunciation issue in section 71.05(c). Section 71.02 did not address the matter. Acts 1977, 65th Leg., R.S., ch. 346, § 1. In 1993, the comprehensive revision of the Penal Code deleted section 71.05(c) and created section 71.02(d). Acts 1993, 73d Leg., R.S., ch. 900, § 900. But another section of the 1993 revision, Acts 1993, 73d Leg., R.S., ch. 761, § 4, apparently assumed section 71.05(c) remained effective. It amended section 71.05(c) and simply failed to address section 71.02(d). The effect was to resurrect section 71.05(c) while leaving effective section 71.02(d).

Before 2011, the two provisions possibly could have been reconciled. The more easily-proved issue provided for in section 71.05(c) applied only to a limited subset of situations—those in which the underlying offense was one listed in subdivisions one through seven and ten of section 71.02. The more limited issue proved for in section 71.02(d) apparently applied to prosecutions based on any covered underlying offense. In 2011, however, the legislature removed the limits on the section 71.05(c) issue. Acts 2011, 82d Leg., R.S., ch. 1200, § 6.

The Committee could not agree on how to accommodate the two obviously-overlapping provisions. It decided to provide instructions under both provisions.

Is the mitigation issue available if, at the guilt-innocence phase of the trial, the defendant was convicted on proof that he committed—rather than conspired to commit—the covered offense? The mitigation issue, unlike the defense, does not require proof that commission of the intended offense was prevented. It does, however, require proof that he withdrew from the combination. This suggests the mitigation issue is available only if the defendant was convicted on a theory requiring proof that he joined a combination, which most likely means he conspired to commit a covered offense and thus joined a conspiracy.

**CPJC 53.18 Instruction—Engaging in Organized Criminal Activity—  
Quasi-Renunciation Punishment Issue (Texas Penal Code  
Section 71.02(d) Formulation)**

You have found the defendant, [name], guilty of organized criminal activity. It is now your duty to assess punishment. Before you assess punishment, however, you must address a preliminary question. The range of punishments from which you must choose the defendant's punishment depends on your answer to that question.

You must determine whether the defendant has proved, by a preponderance of the evidence, that he renounced his criminal objective.

**Relevant Statutes**

If the defendant proves that he renounced his criminal objective, this offense is punishable by—

1. a term of imprisonment for no less than two years and no more than twenty years, or
2. a term of imprisonment for no less than two years and no more than twenty years and a fine of no more than \$10,000.

If the defendant does not prove that he renounced his criminal objective, this offense is punishable by—

1. a term of imprisonment for life or for a term of no less than five years and no more than ninety-nine years, or
2. a term of imprisonment for life or for a term of no less than five years and no more than ninety-nine years and a fine of no more than \$10,000.

A defendant proves he renounced his criminal objective only if the defendant proves, by a preponderance of the evidence, three elements. The elements are that—

1. he withdrew from the combination before commission of the intended criminal offense,
2. this was a voluntary and complete renunciation of the offense, and
3. he made substantial effort to prevent the commission of the intended offense.

You must all agree on whether the defendant has proved that he renounced his criminal objective.

### **Burden of Proof**

The burden is on the defendant to prove, by a preponderance of the evidence, that he renounced his criminal objective.

### **Definitions**

#### *Preponderance of the Evidence*

“Preponderance of the evidence” means the greater weight and degree of the credible evidence.

#### *Voluntary Renunciation of a Criminal Objective*

Renunciation of a criminal objective is not voluntary if it is motivated in whole or in part—

1. by circumstances not present or apparent at the inception of the defendant’s course of conduct that increase the probability of detection or apprehension or that make more difficult the accomplishment of the objective, or
2. by a decision to postpone the criminal conduct until another time or to transfer the criminal act to another but similar objective or victim.

### **Application of Law to Facts**

You must determine whether the defendant has proved, by a preponderance of the evidence, three elements of renunciation of the criminal objective. The elements are that—

1. he withdrew from the combination before commission of the intended criminal offense of aggravated assault,
2. this was a voluntary and complete renunciation of the offense, and
3. he made substantial effort to prevent the commission of the intended offense of aggravated assault.

You must all agree on whether the defendant has proved this before you may assess punishment.

Your resolution of this issue will determine which of the two verdict forms you will use. If you all agree the defendant has proved that he renounced his

criminal objective, use the first verdict form, titled “Verdict—Defendant Has Proved Renunciation of Criminal Objective.” If you all agree the defendant has not proved that he renounced his criminal objective, use the second verdict form, titled “Verdict—Defendant Has Not Proved Renunciation of Criminal Objective.”

If you all agree the defendant has proved, by a preponderance of the evidence, that he renounced his criminal objective, you are to determine and state in your verdict—

1. a term of imprisonment for no less than two years and no more than twenty years, or
2. a term of imprisonment for no less than two years and no more than twenty years and a fine of no more than \$10,000.

If you all agree the defendant has not proved, by a preponderance of the evidence, that he renounced his criminal objective, you are to determine and state in your verdict—

1. a term of imprisonment for life or for a term of no less than five years and no more than ninety-nine years, or
2. a term of imprisonment for life or for a term of no less than five years and no more than ninety-nine years and a fine of no more than \$10,000.

### **VERDICT—DEFENDANT HAS PROVED RENUNCIATION OF CRIMINAL OBJECTIVE**

We, the jury, having found the defendant, [name], guilty of the offense of organized criminal activity, all agree that the defendant has proved that he renounced his criminal objective. We assess the defendant’s punishment at: (select one)

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ years and no fine.

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ years and a fine of \$ \_\_\_\_\_.

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Foreperson of the Jury

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Printed Name of Foreperson

**VERDICT—DEFENDANT HAS NOT PROVED  
RENUNCIATION OF CRIMINAL OBJECTIVE**

We, the jury, having found the defendant, [*name*], guilty of the offense of organized criminal activity, all agree that the defendant has not proved he renounced his criminal objective. We assess the defendant's punishment at: (select one)

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ years and no fine.

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ years and a fine of \$\_\_\_\_\_.

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for life and no fine.

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for life and a fine of \$\_\_\_\_\_.

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Foreperson of the Jury

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Printed Name of Foreperson



**CPJC 53.19 Instruction—Engaging in Organized Criminal Activity—  
Quasi-Renunciation Punishment Issue (Texas Penal Code  
Section 71.05(c) Formulation)**

You have found the defendant, [name], guilty of organized criminal activity. It is now your duty to assess punishment. Before you assess punishment, however, you must address a preliminary question. The range of punishments from which you must choose the defendant's punishment depends on your answer to that question.

You must determine whether the defendant has proved, by a preponderance of the evidence, that he renounced his criminal objective.

**Relevant Statutes**

If the defendant proves that he renounced his criminal objective, this offense is punishable by—

1. a term of imprisonment for no less than two years and no more than twenty years, or
2. a term of imprisonment for no less than two years and no more than twenty years and a fine of no more than \$10,000.

If the defendant does not prove that he renounced his criminal objective, this offense is punishable by—

1. a term of imprisonment for life or for a term of no less than five years and no more than ninety-nine years, or
2. a term of imprisonment for life or for a term of no less than five years and no more than ninety-nine years and a fine of no more than \$10,000.

A defendant proves he renounced his criminal objective only if the defendant proves, by a preponderance of the evidence, two elements. The elements are that—

1. he withdrew from the combination before commission of the intended criminal offense, and
2. he made substantial effort to prevent the commission of the intended offense.

You must all agree on whether the defendant has proved that he renounced his criminal objective.

**Burden of Proof**

The burden is on the defendant to prove, by a preponderance of the evidence, that he renounced his criminal objective.

**Definitions***Preponderance of the Evidence*

“Preponderance of the evidence” means the greater weight and degree of the credible evidence.

**Application of Law to Facts**

You must determine whether the defendant has proved, by a preponderance of the evidence, two elements of renunciation of the criminal objective. The elements are that—

1. he withdrew from the combination before commission of the intended criminal offense of aggravated assault, and
2. he made substantial effort to prevent the commission of the intended offense of aggravated assault.

You must all agree on whether the defendant has proved this before you may assess punishment.

Your resolution of this issue will determine which of the two verdict forms you will use. If you all agree the defendant has proved that he renounced his criminal objective, use the first verdict form, titled “Verdict—Defendant Has Proved Renunciation of Criminal Objective.” If you all agree the defendant has not proved that he renounced his criminal objective, use the second verdict form, titled “Verdict—Defendant Has Not Proved Renunciation of Criminal Objective.”

If you all agree the defendant has proved, by a preponderance of the evidence, that he renounced his criminal objective, you are to determine and state in your verdict—

1. a term of imprisonment for no less than two years and no more than twenty years, or
2. a term of imprisonment for no less than two years and no more than twenty years and a fine of no more than \$10,000.

If you all agree the defendant has not proved, by a preponderance of the evidence, that he renounced his criminal objective, you are to determine and state in your verdict—

1. a term of imprisonment for life or for a term of no less than five years and no more than ninety-nine years, or
2. a term of imprisonment for life or for a term of no less than five years and no more than ninety-nine years and a fine of no more than \$10,000.

**VERDICT—DEFENDANT HAS PROVED  
RENUNCIATION OF CRIMINAL OBJECTIVE**

We, the jury, having found the defendant, [name], guilty of the offense of organized criminal activity, all agree that the defendant has proved that he renounced his criminal objective. We assess the defendant's punishment at: (select one)

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ years and no fine.

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ years and a fine of \$\_\_\_\_\_.

\_\_\_\_\_  
Foreperson of the Jury

\_\_\_\_\_  
Printed Name of Foreperson

**VERDICT—DEFENDANT HAS NOT PROVED  
RENUNCIATION OF CRIMINAL OBJECTIVE**

We, the jury, having found the defendant, [name], guilty of the offense of organized criminal activity, all agree that the defendant has not proved he renounced his criminal objective. We assess the defendant's punishment at: (select one)

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ years and no fine.

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for a term of \_\_\_\_\_ years and a fine of \$\_\_\_\_\_.

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for life and no fine.

\_\_\_\_\_ confinement by the Texas Department of Criminal Justice for life and a fine of \$\_\_\_\_\_.

\_\_\_\_\_  
Foreperson of the Jury

\_\_\_\_\_  
Printed Name of Foreperson

CHAPTER 54	DIRECTING ACTIVITIES OF CRIMINAL STREET GANGS	
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CPJC 54.2	Definition of “Conspires to Commit” . . . . .	246
CPJC 54.3	Instruction—Directing Activities of Criminal Street Gang . . . . .	247

**CPJC 54.1 Statutory History**

The offense of “directing activities of certain criminal street gangs” was added to chapter 71 of the Penal Code in 2009. As originally enacted, the section defined “criminal street gang” narrowly, “[n]otwithstanding Section 71.01.” The offense was renamed by the Eighty-third Legislature in 2013, deleting the word *certain*. The section now uses the same definition of criminal street gang applied to other offenses in chapter 71.

As revised in 2013, the offense now carries a mandatory minimum sentence of twenty-five years, which may make it more attractive to prosecutors.

**CPJC 54.2    Definition of “Conspires to Commit”**

The offense of directing street gangs now can be committed by financing, directing, or supervising either the commission of a listed offense or a conspiracy to do so. The offense used as the example in the instruction in this chapter is murder. Guidance for drafting instructions on murder may be found in *Texas Criminal Pattern Jury Charges—Crimes against Persons & Property*, chapter 80.

A prosecution on the theory of financing, directing, or supervising a conspiracy to commit a listed offense appears to incorporate the definition of “conspires to commit” in Texas Penal Code section 71.01(b).

The Committee is unclear how to apply section 71.01(b) in this context. The definition requires that the defendant himself conspire with at least one other to commit overt acts. Under section 71.023, however, the defendant himself need not be proved to have been a conspirator, so the definition in section 71.01(b) does not neatly fit the situation. The Committee’s proposed instruction simply includes the definition without addressing any difficulty in applying it in this context.

**CPJC 54.3 Instruction—Directing Activities of Criminal Street Gang****INSTRUCTIONS OF THE COURT****Accusation**

*[Insert relevant accusation unit for specific felony. The following example is for the felony of murder under Texas Penal Code section 19.02(b)(1).]*

The state accuses the defendant of having committed the offense of directing the activities of a criminal street gang. Specifically, the accusation is that the defendant, as part of the identifiable leadership of a criminal street gang, knowingly financed, directed, or supervised [names], members of a criminal street gang, to commit, or conspire to commit, the murder of [name].

**Relevant Statutes**

*[Insert relevant statutes and definitions units for charged offense. The following example is for a Texas Penal Code section 71.023 charge, in which the activity of the criminal street gang was to murder. See Texas Penal Code section 19.02(b)(1).]*

A person commits the offense of directing the activities of a criminal street gang if the person, as part of the identifiable leadership of a criminal street gang, knowingly finances, directs, or supervises members of a criminal street gang to commit, or conspire to commit, one or more of certain criminal offenses, including murder.

To prove that the defendant is guilty of directing the activities of a criminal street gang, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. members of a criminal street gang committed, or conspired to commit, one or more of certain criminal offenses, including murder; and
2. the defendant knowingly financed, directed, or supervised the commission of, or conspiracy to commit, the offense; and
3. the defendant did this as part of the identifiable leadership of a criminal street gang.

A person commits an offense if the person intentionally or knowingly causes the death of an individual.



To prove that the defendant is guilty of murder, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant caused the death of an individual, and
2. the defendant did this intentionally or knowingly.

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of directing the activities of a criminal street gang.

### **Definitions**

#### *Criminal Street Gang*

“Criminal street gang” means three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities.

#### *Knowingly Financing, Directing, or Supervising the Commission of, or Conspiracy to Commit, an Offense*

A person knowingly finances, directs, or supervises the commission of, or a conspiracy to commit, a criminal offense when the person is aware that his actions constitute financing, directing, or supervising the commission of, or a conspiracy to commit, the criminal offense.

#### *Conspired to Commit*

“Conspired to commit” means that a person agreed with one or more persons that they or one or more of them engage in conduct that would constitute the offense and that person and one or more of them performed an overt act in pursuance of that agreement.

An agreement constituting conspiring to commit may be inferred from the acts of the parties.

#### *Intentionally Causing the Death of an Individual*

A person intentionally causes the death of an individual if the person has the conscious objective or desire to cause that death.

*Knowingly Causing the Death of an Individual*

A person knowingly causes the death of an individual if the person is aware that his conduct is reasonably certain to cause that death.

*[Additional definitions may be helpful, such as the culpable mental states (Texas Penal Code section 6.03).]*

**Application of Law to Facts**

*[Include relevant application of law to facts unit for charged offense. The following example is for a Texas Penal Code section 71.023 charge, in which the activity of the criminal street gang was to murder. See Texas Penal Code section 19.02(b)(1).]*

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. in [county] County, Texas, on or about [date], [names], members of a criminal street gang, committed, or conspired to commit, the murder of [name]; and
2. the defendant knowingly financed, directed, or supervised the commission of, or conspiracy to commit, the murder of [name]; and
3. the defendant did this as part of the identifiable leadership of a criminal street gang.

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

**COMMENT**

Directing the activities of a criminal street gang is prohibited by and defined in [Tex. Penal Code § 71.023](#). The definition of “conspires to commit” is based on [Tex. Penal](#)

Code § 71.01(b). The definition of “criminal street gang” is based on [Tex. Penal Code § 71.01\(d\)](#).

This instruction is based on an indictment for directing the activities of a criminal street gang in the commission of or conspiracy to commit murder as defined by [Tex. Penal Code § 19.02\(b\)\(1\)](#). The court will need to modify this instruction depending on the accusation.

*[Chapters 55 through 59 are reserved for expansion.]*

CHAPTER 60	ONLINE SOLICITATION OF A MINOR	
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CPJC 60.4	Instruction—Online Solicitation of a Minor—Solicitation by Distributing Sexually Explicit Material . . . . .	261

**CPJC 60.1    Online Solicitation of a Minor Generally**

[Tex. Penal Code § 33.021](#) was amended in 2015 after *Ex parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013), held that subsection (b) of the statute was unconstitutional on free speech grounds.

The offense can be committed in three different ways: (1) by communicating in a sexually explicit manner with a minor; (2) by distributing sexually explicit material to a minor; and (3) by soliciting a minor to meet for sexual purposes. See [Tex. Penal Code § 33.021](#)(b), (c). The three instructions that follow address these different ways of committing the offense.

**CPJC 60.2     Instruction—Online Solicitation of a Minor—Solicitation to Meet****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of online solicitation of a minor. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., knowingly solicited by text message [name], a minor, to meet the defendant with the intent that [name] would engage in sexual intercourse with the defendant*].

**Relevant Statutes**

A person commits an offense if the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, knowingly solicits a minor to meet another person, including the person soliciting, with the intent that the minor will engage in sexual contact, sexual intercourse, or deviate sexual intercourse with the person soliciting or another person.

To prove that the defendant is guilty of online solicitation of a minor, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant knowingly solicited another to meet another person;
2. the person solicited was either—
  - a. younger than seventeen years of age; or
  - b. believed by the defendant to be younger than seventeen years of age;
3. the solicitation was over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service; and
4. the defendant had the intent that the person solicited would engage in sexual contact, sexual intercourse, or deviate sexual intercourse with the defendant or another person.

If these four elements are proven, the defendant is guilty of online solicitation of a minor even if the meeting did not occur.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of online solicitation of a minor.

**Definitions***Minor*

A person is a minor if either—

1. the person is younger than seventeen years of age; or
2. the defendant believes the person is younger than seventeen years of age.

*Sexual Intercourse*

“Sexual intercourse” means any penetration of the female sex organ by the male sex organ.

*Deviate Sexual Intercourse*

“Deviate sexual intercourse” means any contact between any part of the genitals of one person and the mouth or anus of another person or the penetration of the genitals or the anus of another person with an object.

*Sexual Contact*

“Sexual contact” means any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person.

*Knowingly Soliciting a Minor to Meet Another Person*

“Knowingly soliciting a minor to meet another person” means awareness that one’s conduct constitutes soliciting a minor to meet another person.

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], knowingly solicited [name] to meet [insert specific allegations, e.g., the defendant], another person;

2. [name] was [younger than seventeen years of age/believed by the defendant to be younger than seventeen years of age];

3. the solicitation was [*insert mode of solicitation, e.g., by text message*]; and

4. the defendant had the intent that [name] would engage in [sexual contact/sexual intercourse/deviate sexual intercourse] with [*insert specific allegations, e.g., the defendant*].

You must all agree on elements 1 through 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

Online solicitation of a minor to meet another person is prohibited by [Tex. Penal Code § 33.021\(c\)](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#). The definition of “minor” is based on [Tex. Penal Code § 33.021\(a\)\(1\)](#). The definition of “sexual intercourse” is based on [Tex. Penal Code § 21.01\(3\)](#). The definition of “deviate sexual intercourse” is based on [Tex. Penal Code § 21.01\(1\)](#). The definition of “sexual contact” is based on [Tex. Penal Code § 21.01\(2\)](#).



**CPJC 60.3     Instruction—Online Solicitation of a Minor—Solicitation by Communicating in a Sexually Explicit Manner****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of online solicitation of a minor. Specifically, the accusation is that the defendant, while seventeen years of age or older, intentionally [*insert specific allegations, e.g., communicated by text message in a sexually explicit manner with [name], a minor*], with the intent to commit [*insert pled offense, e.g., sexual assault*].

**Relevant Statutes**

A person commits an offense if the person, while seventeen years of age or older, with the intent to commit [*insert pled offense, e.g., sexual assault*], over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service intentionally communicates in a sexually explicit manner with a minor.

To prove that the defendant is guilty of online solicitation of a minor, the state must prove, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant intentionally communicated in a sexually explicit manner with another person;
2. the person with whom the defendant communicated was either—
  - a. younger than seventeen years of age; or
  - b. believed by the defendant to be younger than seventeen years of age;
3. the communication was over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service;
4. the defendant was seventeen years of age or older; and
5. the defendant had the intent to commit [*insert pled offense, e.g., sexual assault*].

## **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of online solicitation of a minor.

## **Definitions**

### *Sexually Explicit*

A person communicates in a sexually explicit manner if the person communicates in a way that involves language or material, including a photographic or video image, relating to or describing sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola.

### *Intentionally Communicate in a Sexually Explicit Manner*

A person intentionally communicates in a sexually explicit manner if the person has the conscious objective or desire to communicate in a sexually explicit manner.

### *Intent to Commit [insert offense]*

A person has the intent to commit [insert offense, e.g., sexual assault] if the person has the conscious objective or desire to commit [insert offense, e.g., sexual assault].

### *Sexual Intercourse*

“Sexual intercourse” means any penetration of the female sex organ by the male sex organ.

### *Deviate Sexual Intercourse*

“Deviate sexual intercourse” means any contact between any part of the genitals of one person and the mouth or anus of another person or the penetration of the genitals or the anus of another person with an object.

### *Sexual Contact*

“Sexual contact” means any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person.

*Minor*

A person is a minor if either—

1. the person is younger than seventeen years of age; or
2. the defendant believes the person is younger than seventeen years of age.

*[Insert definition of offense defendant is alleged to have intended, such as sexual assault, and any related definitions.]*

*Sexual Assault*

A person commits sexual assault if the person intentionally or knowingly causes the penetration of the sexual organ of a child by any means.

*Child*

A “child” means a person younger than seventeen years of age.

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally communicated in a sexually explicit manner with [name];
2. [name] was [younger than seventeen years of age/believed by the defendant to be younger than seventeen years of age];
3. the communication was [*insert mode of communication, e.g., by text message*];
4. the defendant was seventeen years of age or older; and
5. the defendant had the intent to commit [*insert pled offense, e.g., sexual assault*].

You must all agree on elements 1 through 5 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 5 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

Online solicitation of a minor by communicating in a sexually explicit manner is prohibited by [Tex. Penal Code § 33.021\(b\)\(1\)](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#). The definition of “minor” is based on [Tex. Penal Code § 33.021\(a\)\(1\)](#). The definition of “sexually explicit” is derived from [Tex. Penal Code §§ 33.021\(a\)\(3\)](#) and [43.25\(a\)\(2\)](#). The definition of “sexual intercourse” is based on [Tex. Penal Code § 21.01\(3\)](#). The definition of “deviate sexual intercourse” is based on [Tex. Penal Code § 21.01\(1\)](#). The definition of “sexual contact” is based on [Tex. Penal Code § 21.01\(2\)](#). The definition of “sexual assault” is based on [Tex. Penal Code § 22.011\(a\)\(2\)\(A\)](#). The definition of “child” is based on [Tex. Penal Code § 22.011\(c\)\(1\)](#).

**CPJC 60.4 Instruction—Online Solicitation of a Minor—Solicitation by Distributing Sexually Explicit Material****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of online solicitation of a minor. Specifically, the accusation is that the defendant, while seventeen years of age or older, intentionally distributed sexually explicit material to [name], a minor, with the intent to commit [insert specific offense, e.g., sexual assault].

**Relevant Statutes**

A person commits an offense if the person, while seventeen years of age or older, with the intent to commit [insert pled offense, e.g., sexual assault], over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service intentionally distributes sexually explicit material to a minor.

To prove that the defendant is guilty of online solicitation of a minor, the state must prove, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant intentionally distributed sexually explicit material to a person;
2. the person to whom the defendant distributed the sexually explicit material was either—
  - a. younger than seventeen years of age; or
  - b. believed by the defendant to be younger than seventeen years of age;
3. the distribution was over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service;
4. the defendant was seventeen years of age or older; and
5. the defendant had the intent to commit [insert pled offense, e.g., sexual assault].

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of online solicitation of a minor.

### **Definitions**

#### *Sexually Explicit Material*

Sexually explicit material is any material, including a photographic or video image, relating to or describing sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola.

#### *Intentionally Distributes Sexually Explicit Material to a Minor*

A person intentionally distributes sexually explicit material to a minor if the person has the conscious objective or desire to engage in conduct constituting distribution of sexually explicit material to a minor.

#### *Sexual Intercourse*

“Sexual intercourse” means any penetration of the female sex organ by the male sex organ.

#### *Deviate Sexual Intercourse*

“Deviate sexual intercourse” means any contact between any part of the genitals of one person and the mouth or anus of another person or the penetration of the genitals or the anus of another person with an object.

#### *Sexual Contact*

“Sexual contact” means any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person.

#### *Intent to Commit [insert offense]*

A person has the intent to commit [insert offense, e.g., sexual assault] if the person has the conscious objective or desire to commit [insert offense, e.g., sexual assault].

*Minor*

A person is a minor if either—

1. the person is younger than seventeen years of age; or
2. the defendant believes the person is younger than seventeen years of age.

*[Insert definition of offense defendant is alleged to have intended, such as sexual assault, and any related definitions.]*

*Sexual Assault*

A person commits sexual assault if the person intentionally or knowingly causes the penetration of the sexual organ of a child by any means.

*Child*

A “child” means a person younger than seventeen years of age.

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally distributed sexually explicit material to [name];
2. [name] was [younger than seventeen years of age/believed by the defendant to be younger than seventeen years of age];
3. the distribution was [insert mode of distribution, e.g., by text message];
4. the defendant was seventeen years of age or older; and
5. the defendant had the intent to commit [insert pled offense, e.g., sexual assault].

You must all agree on elements 1 through 5 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 5 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

#### COMMENT

Online solicitation by distributing sexually explicit material to a minor is prohibited by [Tex. Penal Code § 33.021\(b\)\(2\)](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#). The definition of “minor” is based on [Tex. Penal Code § 33.021\(a\)\(1\)](#). The definition of “sexually explicit material” is derived from [Tex. Penal Code §§ 33.021\(a\)\(3\)](#) and [43.25\(a\)\(2\)](#). The definition of “sexual intercourse” is based on [Tex. Penal Code § 21.01\(3\)](#). The definition of “deviate sexual intercourse” is based on [Tex. Penal Code § 21.01\(1\)](#). The definition of “sexual contact” is based on [Tex. Penal Code § 21.01\(2\)](#). The definition of “sexual assault” is based on [Tex. Penal Code § 22.011\(a\)\(2\)\(A\)](#). The definition of “child” is based on [Tex. Penal Code § 22.011\(c\)\(1\)](#).



CHAPTER 61	TAMPERING WITH A WITNESS, RETALIATION, AND OBSTRUCTION	
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**CPJC 61.1 General Comments on Tampering with a Witness**

Texas Penal Code section 36.05 provides for what is essentially three different offenses. One, created by [Tex. Penal Code § 36.05\(a\)](#), is tampering with a witness by conferring, or offering or agreeing to confer, a benefit on the witness. A second, under the same subsection, is tampering with a witness by coercing the witness. The third, created by [Tex. Penal Code § 36.05\(b\)](#), is very different and consists of what previously was labeled compounding a crime.

Under [Tex. Penal Code § 36.05](#), an official proceeding must actually be underway. If the target is a prospective witness in an anticipated—“prospective”—official proceeding, conduct regarding that witness cannot constitute an offense under this section.

The criminal behavior may be directed at a witness for defense and still come within the statute: “[T]he witness-tampering statute is not limited to witnesses or prospective witnesses who may be called by the State to give testimony during criminal trials. . . . [W]e conclude that subsection (1) refers to soliciting any witness or prospective witness in an official proceeding ‘to testify falsely,’ including a witness or prospective witness for the defendant.” *Nzewi v. State*, [359 S.W.3d 829](#), 833–34 (Tex. App.—Houston [14th Dist.] 2012, pet. ref’d).

## CPJC 61.2 Tampering by Benefit

According to the language in the first part of [Tex. Penal Code § 36.05](#), the defendant must confer, offer to confer, or agree to confer the benefit on a witness to do one of the prohibited things, such as testify falsely. The statute does not address whether the defendant must have the intent to influence the witness to do one of the prohibited things. If the allegation is that the defendant agreed to confer the benefit, the statute does not address whether the witness must have agreed to do one of the prohibited things in return for the benefit. Further, if the allegation is that the defendant offered to confer the benefit, the statute does not require that the offer to confer the benefit be conditioned on the witness agreeing to do one of the prohibited things. The most likely meaning of the language is that the defendant's conferring or offering or agreeing to confer is sufficient to commit the crime, but in certain circumstances these issues may need to be addressed in the instructions.

Since the offense requires intent to influence the witness, probably no additional culpable mental state is required by [Tex. Penal Code § 6.02\(b\)](#).

An instruction on the defense of reasonable restitution, as provided for in [Tex. Penal Code § 36.05\(c\)](#), is included in the instruction on tampering with a witness by offering to confer a benefit at [CPJC 61.3](#). The defense assumes that the official proceeding was a criminal prosecution; it applies only to prosecutions under [Tex. Penal Code § 36.05\(a\)\(5\)](#), which refers to “the *prosecution* of another” (emphasis added).

The defense cannot apply until the state is represented. This could mean it does not apply to a settlement before any criminal charges are filed. Additionally, the defense in [Tex. Penal Code § 36.05\(c\)](#) assumes the benefit was received, but that is not required by [Tex. Penal Code § 36.05\(b\)](#). As a result, the defense technically cannot apply when the state proves the defendant solicited or agreed to accept a benefit but did not prove that he accepted a benefit. These issues could complicate instructing the jury on this defense in the presence of certain facts.

**CPJC 61.3 Instruction—Tampering with a Witness by Offering to Confer a Benefit****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of tampering with a witness. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., with intent to influence [name], a prospective witness in an official proceeding, specifically a felony trial styled the State of Texas v. [name], Cause Number [number], pending in the [court] Court of [county] County, Texas, offered to confer a benefit [insert specifics if pled, e.g., of cash] on [name] to testify falsely*].

**Relevant Statutes**

A person commits an offense if, with intent to influence the witness, he [confers/offers to confer/agrees to confer] any benefit on a witness or prospective witness in an official proceeding to [testify falsely/withhold any testimony, information, document, or thing/elude legal process summoning him to testify or supply evidence/absent himself from an official proceeding to which he has been legally summoned/abstain from, discontinue, or delay the prosecution of another].

To prove that the defendant is guilty of tampering with a witness, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant [conferred/offered to confer/agreed to confer] any benefit on another person;
2. the other person was a [witness/prospective witness] in an official proceeding;
3. the defendant had the intent to influence the [witness/prospective witness]; and
4. the benefit was for the other person to [testify falsely/withhold any testimony, information, document, or thing/elude legal process summoning him to testify or supply evidence/absent himself from an official proceeding to which he had been legally summoned/abstain from, discontinue, or delay the prosecution of another].

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of tampering with a witness.

### **Definitions**

#### *Official Proceeding*

“Official proceeding” means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

#### *Benefit*

“Benefit” means anything reasonably regarded as economic gain or advantage, including benefit to any other person in whose welfare the beneficiary is interested.

#### *Intent to Influence a [Witness/Prospective Witness]*

“Intent to influence a [witness/prospective witness]” means the conscious objective or desire to influence the [witness/prospective witness].

### **Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], [conferred/offered to confer/agreed to confer] a benefit [insert specifics if pled, e.g., cash,] on [name];
2. [name] was a [witness/prospective witness] in an official proceeding, specifically [insert specifics, e.g., a felony trial styled the State of Texas v. [name], Cause Number [number], pending in the [court] Court of [county] County, Texas];
3. the defendant had the intent to influence [name]; and
4. the benefit was for [name] to [testify falsely/withhold any testimony, information, document, or thing/elude legal process summoning him to testify or supply evidence/absent himself from an official proceeding to which he had been legally summoned/abstain from, discontinue, or delay the prosecution of another].

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the four elements listed above, you must find the defendant “not guilty.”

*[Select one of the following.]*

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

*[or]*

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must next consider whether the defense of reasonable restitution applies.

*[Include the following if the prosecution is under Texas Penal Code section 36.05(a)(5) and the evidence raises the matter.]*

### **Reasonable Restitution**

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must next consider whether the defense of reasonable restitution applies to this offense.

### **Relevant Statutes**

It is a defense to prosecution for tampering with a witness that the benefit received was—

1. reasonable restitution for damages suffered by the complaining witness as a result of the offense; and
2. a result of an agreement negotiated with the assistance or acquiescence of an attorney for the state who represented the state in the case.

### **Burden of Proof**

The defendant is not required to prove this defense. Rather, the state must prove, beyond a reasonable doubt, that the defense does not apply to the defendant’s conduct.

### Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not within the defense of reasonable restitution.

To decide the issue of the defense, you must determine whether the state has proved, beyond a reasonable doubt, that either—

1. the benefit was not reasonable restitution for damages suffered by the complaining witness as a result of the offense; or
2. the benefit was not a result of an agreement negotiated with the assistance or acquiescence of an attorney for the state who represented the state in the case.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of tampering with a witness, and you all agree the state has proved, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

The offense of tampering with a witness is provided for in [Tex. Penal Code § 36.05\(a\)](#). The defense of reasonable restitution is provided for in [Tex. Penal Code § 36.05\(c\)](#). The definition of “official proceeding” is based on [Tex. Penal Code § 1.07\(a\)\(33\)](#). The definition of “benefit” is based on [Tex. Penal Code § 1.07\(a\)\(7\)](#). The definition of “intent to influence” is derived from [Tex. Penal Code § 6.03](#).

## CPJC 61.4 Tampering by Coercion

The 1973 Penal Code had essentially the same definition for “coercion” in what was then section 36.01(1) as is now in [Tex. Penal Code § 1.07\(a\)\(9\)](#). Acts 1973, 63d Leg., ch. 399, sec. 1. The definition was shifted to section 1.07 in the 1993 revision. The only substantive change made in 1993 was to what is now section 1.07(9)(B), which was changed to add that the threat must be “to cause bodily injury *in the future*” (emphasis added). Acts 1993, 73d Leg., ch. 900, sec. 1.01. This apparently was to distinguish theft from robbery.

The shift in the location and substantive modification made in the definition suggest it may be inapplicable to [Tex. Penal Code § 36.05](#). If the definition is applied, a threat to immediately inflict bodily injury on another would not be sufficient for tampering, but a threat to inflict bodily injury *in the future* would be sufficient. This seems unlikely to have been the legislative intent. The instruction for tampering by coercion includes a definition based on [Tex. Penal Code § 1.07\(a\)\(9\)](#) without addressing the question of an immediate threat.

One court of appeals indicated before the 1993 changes that, upon a proper trial court challenge, a defendant charged with coercing a witness is entitled to have the charging instrument specify the kinds of coercion, as listed in what was then [Tex. Penal Code § 36.01\(1\)](#), the state would prove. *Morlett v. State*, 656 S.W.2d 603, 605 (Tex. App.—Corpus Christi 1983, no pet.) (failure to specify kind of coercion was not fundamental defect raisable for first time on appeal).

Must the witness actually do the prohibited thing, such as testify falsely, or is it enough that the defendant engages in coercion for the purpose of making, that is, with intent to make, the witness do this? The most likely meaning of the language is that the defendant must engage in coercion for the purpose of compelling the witness to do one of the prohibited things. Thus the crime is complete when the defendant coerces with the required intent. The instruction offers an alternative formulation of the elements that would explicitly provide for this.

[Tex. Penal Code § 6.02\(b\)](#) does not apply to impose an additional culpable mental state requirement because this offense does prescribe a culpable mental state, that is, the intent to influence the witness.



**CPJC 61.5 Instruction—Tampering with a Witness by Coercion****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of tampering with a witness. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., with intent to influence [name], a prospective witness in an official proceeding, specifically a felony trial styled the State of Texas v. [name], Cause Number [number], pending in the [court] Court of [county] County, Texas, coerced [name] to testify falsely by threatening to inflict bodily injury on [name]*].

**Relevant Statutes**

A person commits an offense if, with intent to influence the witness, he coerces a [witness/prospective witness] in an official proceeding to [testify falsely/withhold any testimony, information, document, or thing/elude legal process summoning him to testify or supply evidence/absent himself from an official proceeding to which he has been legally summoned/abstain from, discontinue, or delay the prosecution of another].

To prove that the defendant is guilty of tampering with a witness, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant coerced a person;
2. the person coerced was a [witness/prospective witness] in an official proceeding;
3. the coercion was to [testify falsely/withhold any testimony, information, document, or thing/elude legal process summoning him to testify or supply evidence/absent himself from an official proceeding to which he had been legally summoned/abstain from, discontinue, or delay the prosecution of another]; and
4. the defendant did this with intent to influence the witness.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of tampering with a witness.

## Definitions

### *Official Proceeding*

“Official proceeding” means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

### *Benefit*

“Benefit” means anything reasonably regarded as economic gain or advantage, including benefit to any other person in whose welfare the beneficiary is interested.

### *Intent to Influence a [Witness/Prospective Witness]*

“Intent to influence a [witness/prospective witness]” means the conscious objective or desire to influence the [witness/prospective witness].

### *Coercion*

“Coercion” means a threat, however that threat is communicated, to—

1. commit an offense;
2. inflict bodily injury in the future on the person threatened or another;
3. accuse a person of any offense;
4. expose a person to hatred, contempt, or ridicule;
5. harm the credit or business repute of any person; or
6. take or withhold action as a public servant, or to cause a public servant to take or withhold action.

## Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], coerced [name];
2. [name] was a [witness/prospective witness] in an official proceeding, specifically [insert specifics, e.g., a felony trial styled the State of Texas v. [name], Cause Number [number], pending in the [court] Court of [county] County, Texas];

3. the coercion was to [testify falsely/withhold any testimony, information, document, or thing/elude legal process summoning him to testify or supply evidence/absent himself from an official proceeding to which he had been legally summoned/abstain from, discontinue, or delay the prosecution of another]; and

4. the defendant did this with intent to influence [*name*], the [witness/prospective witness].

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the four elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

#### COMMENT

The offense of tampering with a witness is provided for in [Tex. Penal Code § 36.05\(a\)](#). The definition of “official proceeding” is based on [Tex. Penal Code § 1.07\(a\)\(33\)](#). The definition of “benefit” is based on [Tex. Penal Code § 1.07\(a\)\(7\)](#). The definition of “intent to influence” is derived from [Tex. Penal Code § 6.03](#). The definition of “coercion” is based on [Tex. Penal Code § 1.07\(a\)\(9\)](#).

## CPJC 61.6 Tampering by “Compounding”

Texas Penal Code section 36.05(b) is not described by the name traditionally given the offense, “compounding.” Compounding does not consist of tampering but rather of being tampered with. The section is clearly based on the traditional offense of compounding and, before 1993, was a separate offense with this title. In the 1993 revision of the Penal Code, it was inserted into tampering with a witness. Acts 1993, 73d Leg., ch. 900, sec. 1.01. This raises the issue of how the instruction should refer to the offense. “Tampering with a witness” is misleading, but the statute does not use the term *compounding a crime*.

Under [Tex. Penal Code § 36.05\(b\)](#), action by the witness or prospective witness must be taken “on the representation or understanding that” the defendant will do any of certain things. There is some uncertainty about what this requires. If the state’s theory is that there was an “understanding,” does this mean an agreement? How is this different from taking action on a “representation”? For action to be taken on a representation, perhaps the defendant must be proved to have “represented” that he would do one of the prohibited things if provided with the benefit. Most likely, whatever the uncertainty might be, it does not justify going beyond the statutory language.

The defense in [Tex. Penal Code § 36.05\(c\)](#) does not, under the terms of the statute, apply in prosecution of witnesses under [Tex. Penal Code § 36.05\(b\)](#). The statutory language is clear. Under the defense of reasonable restitution, the complaining witness could be found guilty but not the person settling with the witness.

**CPJC 61.7 Instruction—Tampering with a Witness—“Compounding”****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of tampering with a witness. Specifically, the accusation is that the defendant, a [witness/prospective witness] in an official proceeding, [*insert specifics, e.g., a felony trial styled the State of Texas v. [name], Cause Number [number], pending in the [court] Court of [county] County, Texas,* knowingly [solicited/accepted/agreed to accept] a benefit on the representation or understanding that he would [testify falsely/withhold any testimony, information, document, or thing/elude legal process summoning him to testify or supply evidence/absent himself from an official proceeding to which he had been legally summoned/abstain from, discontinue, or delay the prosecution of another].

**Relevant Statutes**

A [witness/prospective witness] in an official proceeding commits an offense if he knowingly [solicits/accepts/agrees to accept] any benefit on the representation or understanding that he will [testify falsely/withhold any testimony, information, document, or thing/elude legal process summoning him to testify or supply evidence/absent himself from an official proceeding to which he has been legally summoned/abstain from, discontinue, or delay the prosecution of another].

To prove that the defendant is guilty of tampering with a witness, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant knowingly [solicited/accepted/agreed to accept] a benefit;
2. the defendant did this while the defendant was a [witness/prospective witness] in an official proceeding; and
3. this was done on the representation or understanding that the defendant would [testify falsely/withhold any testimony, information, document, or thing/elude legal process summoning him to testify or supply evidence/absent himself from an official proceeding to which he had been legally summoned/abstain from, discontinue, or delay the prosecution of another].

## **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of tampering with a witness.

## **Definitions**

### *Official Proceeding*

“Official proceeding” means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

### *Benefit*

“Benefit” means anything reasonably regarded as economic gain or advantage, including benefit to any other person in whose welfare the beneficiary is interested.

### *Knowingly [Soliciting/Accepting/Agreeing to Accept] a Benefit*

“Knowingly [soliciting/accepting/agreeing to accept] a benefit” means awareness that one’s conduct is [soliciting/accepting/agreeing to accept] a benefit.

## **Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], knowingly [solicited/accepted/agreed to accept] a benefit;
2. the defendant did this while the defendant was a [witness/prospective witness] in [insert specifics, e.g., a felony trial styled the State of Texas v. [name], Cause Number [number], pending in the [court] Court of [county] County, Texas], an official proceeding; and
3. this was done on the representation or understanding that the defendant would [testify falsely/withhold any testimony, information, document, or thing/elude legal process summoning him to testify or supply evidence/absent himself from an official proceeding to which he had been legally summoned/abstain from, discontinue, or delay the prosecution of another].

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the three elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

#### COMMENT

The offense of tampering with a witness is provided for in [Tex. Penal Code § 36.05\(b\)](#). The definition of “official proceeding” is based on [Tex. Penal Code § 1.07\(a\)\(33\)](#). The definition of “benefit” is based on [Tex. Penal Code § 1.07\(a\)\(7\)](#). The definition of “knowingly soliciting, accepting, or agreeing to accept a benefit” is derived from [Tex. Penal Code § 6.03](#).

## CPJC 61.8 Retaliation or Obstruction Generally

Texas Penal Code section 36.06 creates two offenses effectively described by the two terms used in the title: obstruction and retaliation.

**Culpable Mental State.** [Tex. Penal Code § 36.06\(a\)\(1\)](#) appears to require that the defendant was motivated by the victim’s status or past actions. The prescribed culpable mental state (knowingly) most likely applies only to the act element—harming or threatening. It most likely does not require the defendant to know that the act is “unlawful.”

While it is unclear whether it is necessary for the jury to find that the specific act or threat alleged is or would be an “unlawful act,” common practice seems to be to plead that explicitly. The instructions at [CPJC 61.9](#) and [CPJC 61.10](#) assume this is necessary and include this in the second element of the relevant statutes unit.

Elements 1 and 2 of the relevant statutes unit may be combined, especially if the jury is not to be instructed that the act or threat must be an unlawful act. Separating out element 2 serves primarily to emphasize the requirement of an unlawful act or a threat to harm by an unlawful act. If elements 1 and 2 were combined, element 1 would read as follows:

1. the defendant intentionally or knowingly [harmed/threatened to harm] another person by an unlawful act; and

This might, however, incorrectly suggest that intentionally or knowingly applies to the act being unlawful.

**Retaliation by Threat.** A 1983 decision indicates that a charging instrument alleging retaliation by threat must specify the manner and means of making the threat, including “how and to whom the threat was made.” *Doyle v. State*, [661 S.W.2d 726, 730](#) (Tex. Crim. App. 1983) (per curiam). Language in the opinion suggests this means the charging instrument must specify whether the threat was conveyed “face to face in person, over the phone directly, through a third party, or through the mail.” *Doyle*, [661 S.W.2d at 730](#). The instruction at [CPJC 61.9](#) assumes *Doyle* remains good law and that the instruction should incorporate the charging instrument’s specifications in compliance with that decision.



**CPJC 61.9 Instruction—Retaliation****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of retaliation.

*[Select one of the following. If the alleged offense was committed by threatening to harm, use the first option. If the alleged offense was committed by actual harming, use the second option.]*

Specifically, the accusation is that the defendant *[insert specific allegations, e.g., intentionally or knowingly threatened to harm [name] by an unlawful act, specifically by striking [name], in retaliation for and on account of the service of [name] as a public servant, and the threat was communicated to [name] in person]*.

*[or]*

Specifically, the accusation is that the defendant *[insert specific allegations, e.g., intentionally or knowingly harmed [name] by an unlawful act, specifically by striking [name], in retaliation for and on account of the service of [name] as a public servant]*.

**Relevant Statutes**

A person commits an offense if the person intentionally or knowingly harms or threatens to harm another by an unlawful act in retaliation for or on account of the service or status of another as a public servant, witness, prospective witness, or informant, or another who has reported or who the person knows intends to report the occurrence of a crime.

To prove that the defendant is guilty of retaliation, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant intentionally or knowingly [harmed/threatened to harm] another person;
2. [the harm was caused by/the threat was to harm the other person by] an unlawful act; and
3. the defendant did this in retaliation for or on account of the service or status of the other person as a [public servant/witness/prospective witness/

informant/person who had reported the occurrence of a crime/person who the defendant knew intended to report the occurrence of a crime].

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of retaliation.

### **Definitions**

#### *Harm*

“Harm” means anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.

#### *Informant*

“Informant” means a person who has communicated information to the government in connection with any governmental function.

#### *Public Servant*

“Public servant” means a person elected, selected, appointed, employed, or otherwise designated, even if he has not yet qualified for office or assumed his duties, as—

1. an officer, employee, or agent of government;
2. a juror or grand juror;
3. an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;
4. an attorney at law or notary public when participating in the performance of a governmental function;
5. a candidate for nomination or election to public office;
6. a person who is performing a governmental function under a claim of right although he is not legally qualified to do so; or
7. an honorably retired police officer.

#### *Honorably Retired Police Officer*

“Honorably retired police officer” means a peace officer who—

1. did not retire in lieu of any disciplinary action;
2. was eligible to retire from a law enforcement agency or was ineligible to retire only as a result of an injury received in the course of the officer's employment with the agency; and
3. is entitled to receive a pension or annuity for service as a law enforcement officer or is not entitled to receive a pension or annuity only because the law enforcement agency that employed the officer does not offer a pension or annuity to its employees.

### *Unlawful*

“Unlawful” means criminal or tortious or both. It includes what would be criminal or tortious but for a defense not amounting to justification or privilege.

### *Intentionally [Harmed/Threatened to Harm] Another Person*

“Intentionally [harmed/threatened to harm] another person” means having the conscious objective or desire [to cause harm to another person/to engage in conduct constituting a threat to harm another person].

### *Knowingly [Harmed/Threatened to Harm] Another Person*

“Knowingly [harmed/threatened to harm] another person” means being aware that one's conduct is reasonably certain [to cause harm to another person/to constitute a threat to harm another person].

### **Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

*[Select one of the following. If the alleged offense was committed by threatening to harm, use the first option. If the alleged offense was committed by actual harming, use the second option.]*

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly [insert specific allegations, e.g., threatened to harm [name] by striking [name] and communicated this threat to [name] in person];
2. harming [name] by striking [name] would be an unlawful act; and

*[or]*

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly [insert specific allegations, e.g., harmed [name] by striking [name]];

2. harming [name] by striking [name] was an unlawful act; and

*[Continue with the following.]*

3. the defendant did this in retaliation for or on account of the service or status of [name] as a [public servant/witness/prospective witness/informant/person who had reported the occurrence of a crime/person who the defendant knew intended to report the occurrence of a crime].

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

The offense of obstruction or retaliation is provided for in [Tex. Penal Code § 36.06\(a\)](#). The definition of “harm” is based on [Tex. Penal Code § 1.07\(a\)\(25\)](#). The definition of “informant” is based on [Tex. Penal Code § 36.06\(b\)\(2\)](#). The definition of “public servant” is based on [Tex. Penal Code § 36.06\(b\)\(3\)](#). The definition of “honorably retired police officer” is based on [Tex. Penal Code § 36.06\(b\)\(1\)](#). The definition of “unlawful” is based on [Tex. Penal Code § 1.07\(a\)\(48\)](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#).

**CPJC 61.10 Instruction—Obstruction****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of obstruction. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally or knowingly harmed [name] by an unlawful act, specifically by shooting [name] with a gun, to prevent or delay the service of [name] as a witness*].

**Relevant Statutes**

A person commits an offense if the person intentionally or knowingly harms or threatens to harm another individual by an unlawful act to prevent or delay the service of the other individual as a public servant, witness, prospective witness, or informant or an individual who has reported or who the person knows intends to report the occurrence of a crime.

To prove that the defendant is guilty of obstruction, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant intentionally or knowingly [harmed/threatened to harm] another person;
2. the [harm was caused by/threat was to harm the other person by] an unlawful act; and
3. the defendant did this to prevent or delay the service of the other person as a [public servant/witness/prospective witness/informant/person who had reported the occurrence of a crime/person who the defendant knew intended to report the occurrence of a crime].

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of obstruction.

## Definitions

### *Harm*

“Harm” means anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.

### *Informant*

“Informant” means a person who has communicated information to the government in connection with any governmental function.

### *Public Servant*

“Public servant” means a person elected, selected, appointed, employed, or otherwise designated, even if he has not yet qualified for office or assumed his duties, as—

1. an officer, employee, or agent of government;
2. a juror or grand juror;
3. an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;
4. an attorney at law or notary public when participating in the performance of a governmental function;
5. a candidate for nomination or election to public office;
6. a person who is performing a governmental function under a claim of right although he is not legally qualified to do so; or
7. an honorably retired police officer.

### *Honorably Retired Police Officer*

“Honorably retired police officer” means a peace officer who—

1. did not retire in lieu of any disciplinary action;
2. was eligible to retire from a law enforcement agency or was ineligible to retire only as a result of an injury received in the course of the officer’s employment with the agency; and
3. is entitled to receive a pension or annuity for service as a law enforcement officer or is not entitled to receive a pension or annuity only

because the law enforcement agency that employed the officer does not offer a pension or annuity to its employees.

### *Unlawful*

“Unlawful” means criminal or tortious or both. It includes what would be criminal or tortious but for a defense not amounting to justification or privilege.

### *Intentionally [Harmed/Threatened to Harm] Another Person*

“Intentionally [harmed/threatened to harm] another person” means having the conscious objective or desire [to cause harm to another person/to engage in conduct constituting a threat to harm another person].

### *Knowingly [Harmed/Threatened to Harm] Another Person*

“Knowingly [harmed/threatened to harm] another person” means being aware that one’s conduct is reasonably certain [to cause harm to another person/to constitute a threat to harm another person].

## **Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly [insert specific allegations, e.g., harmed [name] by shooting [name] with a gun];
2. [insert specific allegations, e.g., harming [name] by shooting [name] with a gun] was an unlawful act; and
3. the defendant did this to prevent or delay the service of [name] as a [public servant/witness/prospective witness/informant/person who had reported the occurrence of a crime/person who the defendant knew intended to report the occurrence of a crime].

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, and 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

The offense of obstruction or retaliation is provided for in [Tex. Penal Code § 36.06\(a\)](#). The definition of “harm” is based on [Tex. Penal Code § 1.07\(a\)\(25\)](#). The definition of “informant” is based on [Tex. Penal Code § 36.06\(b\)\(2\)](#). The definition of “public servant” is based on [Tex. Penal Code § 36.06\(b\)\(3\)](#). The definition of “honorably retired police officer” is based on [Tex. Penal Code § 36.06\(b\)\(1\)](#). The definition of “unlawful” is based on [Tex. Penal Code § 1.07\(a\)\(48\)](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#).



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## CPJC 62.1 Perjury and Aggravated Perjury Generally

Perjury can be committed in three alternative ways: (1) by making a false statement under oath, (2) by swearing to the truth of a false statement previously made, and (3) by making a false unsworn declaration. The instructions for perjury and aggravated perjury that follow set out what appears to be the most commonly prosecuted of these alternatives: making a false statement under oath.

To prove perjury by making a false statement under oath, the state has two options: (1) it can prove the falsity of the defendant's sworn statement, or (2) under [Tex. Penal Code § 37.06](#), the state can prove that the defendant made two inconsistent statements under oath, one of which must necessarily be false. Under this second option of establishing perjury by inconsistent statements, the state never has to prove—and the jury never has to decide—which of the two statements is false. By proving all the other elements of perjury for both statements and showing the two statements are inconsistent, the state circumstantially proves that one of the statements must be false. Because of this difference between perjury by inconsistent statements and perjury by proof of a single false statement, the Committee decided that separate instructions were warranted.

**The Two-Witness Rule.** The most difficult challenge the Committee encountered in crafting a perjury instruction was how to instruct the jury on the two-witness rule from article 38.18(a) of the Texas Code of Criminal Procedure. This statute does not apply to perjury by inconsistent statements. But for all other forms of perjury and aggravated perjury, article 38.18(a) provides: “No person may be convicted . . . if proof that his statement is false rests solely upon the testimony of one witness other than the defendant.” [Tex. Code Crim. Proc. art. 38.18\(a\)](#).

One interpretation of the statute is that two witnesses are required for conviction. It is also possible that one witness plus corroborative evidence would be sufficient, because this, too, would be something more than “solely . . . the testimony of one witness.”

The history of the two-witness rule lends support to this second interpretation. The statute as it was written in 1865 provided that a conviction for perjury could rest on the testimony of two credible witnesses *or* one credible witness with “strong” corroborating circumstances. The rule ensured that a defendant would not be convicted for his sworn testimony when the proof of his guilt was of no better caliber (i.e., the sworn testimony of someone else). A trial that merely pitted an “oath against oath,” was insufficient to sustain a conviction. *Maines v. State*, 9 S.W. 51, 52 (Tex. App. 1888). For nearly a century, the statute remained largely the same (requiring two witnesses or one with strong corroboration) until its amendment to its present form in 1973. Given this history, it would have been a significant change for the legislature to eliminate one witness plus corroborative evidence as a way of proving perjury. Yet instead of showing signs that the legislature was departing from the prior rule, the legislative history

indicates the revisions to article 38.18(a) were intended as a “language change” and not a change in the law. See Subcommittee on Criminal Matters, Jurisprudence Committee, 63d R.S., March 13, 1973, Texas Senate Recording 630526(a) at 20:18, available online at <https://www.tsl.texas.gov/ref/senaterecordings/63rd-R.S./630526a/index.html>.

**Article 38.17 and When to Instruct the Jury under Article 38.18(a).** Under [Tex. Code Crim. Proc. art. 38.17](#), the trial court may direct a verdict of acquittal if the state fails to satisfy the two-witness rule as a matter of law. If the judge does not resolve the issue as a matter of law, Texas courts have long held that the jury must be instructed on the two-witness rule. *E.g.*, *Knight v. State*, [158 S.W. 543](#), 544 (Tex. Crim. App. 1913); *Brown v. State*, [276 S.W. 929](#), 931 (Tex. Crim. App. 1925). More recent case law suggests a trial court does not err—at least reversibly—in failing to instruct on the two-witness rule if the record shows the requirements of the rule were clearly met. *McGuire v. State*, [707 S.W.2d 223](#), 228 (Tex. App.—Houston [14th Dist.] 1986, pet. ref’d, untimely filed) (“Since we have found more than one witness testified as to the falsity of appellant’s statement there was no error in the failure to . . . instruct the jury [that no person may be convicted of perjury on the testimony of one witness].”). In those instances, however, where the evidence raises a possibility that the jury might convict solely on the testimony of a single witness (such as where the state offers the testimony of only two witnesses, one of whom has been impeached), the better practice is to instruct the jury on article 38.18. Otherwise, the jury could end up convicting a defendant solely on the testimony of a single witness.

**How to Instruct the Jury under Article 38.18(a).** Given the revision to article 38.18(a), the Committee could not agree on precisely what juries could be told. Some members of the Committee believed that the language of the statute (that the jury cannot convict solely on the testimony of one witness other than the defendant) would, in the mind of a nonlawyer, convey that two or more witnesses were required and that more guidance from the judge was necessary to explain that one witness with corroborating evidence would also be sufficient to convict. Other members were concerned that spelling out two or more witnesses or one witness with corroborating evidence, while possibly an accurate statement of the law, went beyond the language of the current statute. Still others believed one witness with corroboration has been written out of the statute and thus should not be presented to jurors as the law. In the face of this uncertainty, the Committee offers an instruction that tracks article 38.18(a) with additional language in brackets that might also be used. When the state’s evidence of falsity rests on the testimony of multiple witnesses whose credibility has not been attacked, the bracketed instruction will likely be unnecessary. But when the state’s evidence of falsity comes from only one witness with corroborative evidence, the state may be entitled to the additional bracketed instruction.

**The Element of Materiality in Aggravated Perjury.** [Tex. Penal Code § 37.04\(c\)](#) declares the issue of materiality to be a question of law. Because materiality

is an element of aggravated perjury, however, refusing to submit the question of materiality to the jury infringes on a defendant's right to have a jury determine his guilt of every element of the crime. *United States v. Gaudin*, 515 U.S. 506, 522 (U.S. 1995); *Dodson v. State*, 268 S.W.3d 674, 679 (Tex. App.—Fort Worth 2008, pet. ref'd). Consequently, the question of materiality must be submitted to the jury.

**The Defense of Retraction.** The defense of retraction applies only to aggravated perjury, not perjury. [Tex. Penal Code § 37.05](#).

**Perjury by Unsworn Declaration.** Since 1993, the offense of perjury has applied to both false statements under oath and false unsworn declarations. Acts 1993, 73d Leg., R.S., ch. 900, § 1.01, sec. 37.02 (S.B. 1067), eff. Sept. 1, 1994. Unsworn declarations are governed by the Texas Civil Practice and Remedies Code, which provides a legally effective alternative to a sworn statement but, until recently, was only available to prison or jail inmates. See [Tex. Civ. Prac. & Rem. Code § 132.001](#); *Dominguez v. State*, 441 S.W.3d 652, 657 (Tex. App.—Houston [1st Dist.] 2014, no pet.). In 2011, however, [Tex. Civ. Prac. & Rem. Code § 132.001](#) was expanded to allow any person to use an unsworn declaration in lieu of a legally required affidavit or other sworn statement. Acts 2011, 82d Leg., R.S., ch. 847, § 1 (H.B. 3674), eff. Sept. 1, 2011, *amended by* Acts 2013, 83d Leg., R.S., ch. 946, § 1 (H.B. 1728), eff. June 14, 2013. The jury instruction for perjury by false statement under oath can be modified to suit this form of perjury by substituting references to a false unsworn declaration in place of a false statement under oath.

**CPJC 62.2     Instruction—Perjury by Making a False Statement under Oath****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of perjury. Specifically, the accusation is that the defendant, with intent to deceive and with knowledge of the statement's meaning, made a false statement under oath [*insert substance of the statement and, if alleged, also insert in what respect the statement was false*], and the statement was required or authorized by law to be made under oath.

**Relevant Statutes**

A person commits an offense if, with intent to deceive and with knowledge of the statement's meaning, he makes a false statement under oath and the statement is required or authorized by law to be made under oath.

To prove that the defendant is guilty of perjury, the state must prove, beyond a reasonable doubt, six elements. The elements are that—

1. the defendant made a statement;
2. the statement was false;
3. the defendant made the statement with the intent to deceive;
4. the defendant made the statement with knowledge of the statement's meaning;
5. the statement was made under oath; and
6. the statement was required or authorized by law to be made under oath.

The evidence that the defendant's statement was false is not sufficient if it is solely the testimony of one witness other than the defendant. [*Include if applicable: You may find the evidence sufficient if that evidence consists of the testimony of two witnesses or one witness with corroborating circumstances.*]

*[Include the following if raised by the evidence.]*

It is no defense that the oath was administered or taken in an irregular manner.

*[Include the following if raised by the evidence.]*

It is no defense that there was some irregularity in the appointment or qualification of the person who administered the oath.

*[Include the following if raised by the evidence.]*

It is no defense that a document was not sworn to if the document contains a recital that it was made under oath, the declarant was aware of the recital when he signed the document, and the document contains the signed jurat of a public servant authorized to administer oaths.

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of perjury.

### **Definitions**

#### *Statement*

“Statement” means any representation of fact.

#### *Intent to Deceive*

“Intent to deceive” means the conscious objective or desire to deceive.

#### *Knowledge of a Statement’s Meaning*

“Knowledge of a statement’s meaning” means awareness of the meaning of the statement.

### **Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, six elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], made a statement, [insert substance of statement as alleged];
2. the statement was false [insert in what respect the statement was false];
3. the defendant made the statement with the intent to deceive;
4. the defendant made the statement with knowledge of the statement’s meaning;

5. the statement was made under oath; and
6. the statement was required or authorized by law to be made under oath.

You must all agree on elements 1 through 6 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 6 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the six elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

#### COMMENT

The offense of perjury is provided for in [Tex. Penal Code § 37.02](#). The definition of “statement” is based on [Tex. Penal Code § 37.01\(3\)](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#).

**Optional Language Regarding Two-Witness Rule.** The relevant statutes unit of this instruction includes optional text regarding the two-witness rule established by [Tex. Code Crim. Proc. art. 38.18\(a\)](#). See CPJC 62.1 for more information about how to instruct the jury under article 38.18(a).



**CPJC 62.3 Instruction—Perjury by Inconsistent Statements****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of perjury. Specifically, the accusation is that the defendant, with intent to deceive and with knowledge of the statements' meaning, made two inconsistent statements under oath, one of the two statements necessarily being false, the first of such statements being [*insert substance of the first statement*], and the second of such statements being [*insert substance of the second statement*], and both such statements were required or authorized by law to be made under oath.

**Relevant Statutes**

A person commits perjury if the person, with intent to deceive and with knowledge of the statements' meaning, makes two inconsistent statements under oath, one of which is necessarily false, and the statements were required or authorized by law to be made under oath.

The state is not required to prove which of the two statements is false.

To prove that the defendant is guilty of perjury, the state must prove, beyond a reasonable doubt, six elements. The elements are that—

1. the defendant made two statements;
2. both statements were made under oath;
3. both statements were required or authorized by law to be made under oath;
4. the two statements could not both be true;
5. the defendant made the statements with knowledge of their meaning; and
6. the defendant had the intent to deceive.

*[Include the following if raised by the evidence.]*

It is no defense that the oath was administered or taken in an irregular manner.

*[Include the following if raised by the evidence.]*

It is no defense that there was some irregularity in the appointment or qualification of the person who administered the oath.

*[Include the following if raised by the evidence.]*

It is no defense that a document was not sworn to if the document contains a recital that it was made under oath, the declarant was aware of the recital when he signed the document, and the document contains the signed jurat of a public servant authorized to administer oaths.

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of perjury.

### **Definitions**

#### *Statement*

“Statement” means any representation of fact.

#### *Intent to Deceive*

“Intent to deceive” means the conscious objective or desire to deceive.

#### *Knowledge of a Statement’s Meaning*

“Knowledge of a statement’s meaning” means awareness of the meaning of the statement.

### **Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, six elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date] made the statement [insert substance of the first statement], and on or about [date] made the statement [insert substance of the second statement];
2. both statements were made under oath;
3. both statements were required or authorized by law to be made under oath;
4. the two statements could not both be true;
5. the defendant made the statements with knowledge of their meaning; and

6. the defendant had the intent to deceive.

You must all agree on elements 1 through 6 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 6 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the six elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

#### COMMENT

The offense of perjury is provided for in [Tex. Penal Code § 37.02](#). The definition of “statement” is based on [Tex. Penal Code § 37.01\(3\)](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#).

**CPJC 62.4     Instruction—Aggravated Perjury by Making a False Statement under Oath****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of aggravated perjury. Specifically, the accusation is that the defendant, with intent to deceive and with knowledge of the statement's meaning, made a false statement under oath, namely [*insert substance of the statement and, if alleged, also insert in what respect the statement was false*], and the statement was required or authorized by law to be made under oath, was made during or in connection with an official proceeding [*insert, if alleged, the name of the court or public servant by whom the oath was administered*], and was material [*insert any allegation of how the statement was material*].

**Relevant Statutes**

A person commits an offense if he commits perjury and the false statement is made during or in connection with an official proceeding and is material.

A person commits perjury if, with intent to deceive and with knowledge of the statement's meaning, he makes a false statement under oath and the statement is required or authorized by law to be made under oath.

To prove that the defendant is guilty of aggravated perjury, the state must prove, beyond a reasonable doubt, eight elements. The elements are that—

1. the defendant made a statement;
2. the statement was false;
3. the defendant made the statement with the intent to deceive;
4. the defendant made the statement with knowledge of the statement's meaning;
5. the statement was made under oath;
6. the statement was required or authorized by law to be made under oath;
7. the statement was made during or in connection with an official proceeding; and
8. the statement was material.

The evidence that the defendant's statement was false is not sufficient if it is solely the testimony of one witness other than the defendant. *[Include if applicable: You may find the evidence sufficient if that evidence consists of the testimony of two witnesses or one witness with corroborating circumstances.]*

*[Include the following if raised by the evidence.]*

It is not a defense to prosecution that the defendant mistakenly believed the statement to be immaterial.

*[Include the following if raised by the evidence.]*

It is not a defense that the oath was administered or taken in an irregular manner.

*[Include the following if raised by the evidence.]*

It is not a defense that there was some irregularity in the appointment or qualification of the person who administered the oath.

*[Include the following if raised by the evidence.]*

It is not a defense that a document was not sworn to if the document contains a recital that it was made under oath, the declarant was aware of the recital when he signed the document, and the document contains the signed jurat of a public servant authorized to administer oaths.

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of aggravated perjury.

### **Definitions**

#### *Statement*

"Statement" means any representation of fact.

#### *Intent to Deceive*

"Intent to deceive" means the conscious objective or desire to deceive.

*Knowledge of a Statement's Meaning*

"Knowledge of a statement's meaning" means awareness of the meaning of the statement.

*Material*

A statement is "material" if it could have affected the course or outcome of the official proceeding.

*Official Proceeding*

"Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

*Public Servant*

"Public servant" means a person elected, selected, appointed, employed, or otherwise designated, even if he has not yet qualified for office or assumed his duties, as—

1. an officer, employee, or agent of government;
2. a juror or grand juror;
3. an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;
4. an attorney at law or notary public when participating in the performance of a governmental function;
5. a candidate for nomination or election to public office; or
6. a person who is performing a governmental function under a claim of right although he is not legally qualified to do so.

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, eight elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], made a statement, [insert substance of statement as alleged];
2. the statement was false [if alleged, insert in what respect the statement was false];
3. the defendant made the statement with the intent to deceive;

4. the defendant made the statement with knowledge of the statement's meaning;
5. the statement was made under oath;
6. the statement was required or authorized by law to be made under oath;
7. the statement was made during or in connection with an official proceeding [*if alleged, insert details of official proceeding*]; and
8. the statement was material.

You must all agree on elements 1 through 8 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 8 listed above, you must find the defendant “not guilty.”

*[Select one of the following.]*

If you all agree the state has proved, beyond a reasonable doubt, each of the eight elements listed above, you must find the defendant “guilty.”

*[or]*

If you all agree the state has proved, beyond a reasonable doubt, each of the eight elements listed above, you must next consider whether the state has proved that the defense of retraction does not apply.

*[Include the following if raised by the evidence.]*

### **Retraction**

You have heard evidence that, after the defendant made the statement [*insert substance of statement as alleged*], he retracted his statement before the completion of the official proceeding and before it became manifest that the falsity of the statement would be exposed.

### **Relevant Statutes**

A false statement under oath that would otherwise constitute the crime of aggravated perjury is not a criminal offense if—

1. the defendant retracted his false statement;

2. the retraction occurred before completion of the testimony at the official proceeding; and

3. the retraction also occurred before it became manifest that the falsity of the statement would be exposed.

### **Burden of Proof**

The defendant is not required to prove that the defense of retraction applies to this case. Rather, the state must prove, beyond a reasonable doubt, that the defense of retraction does not apply.

### **Application of Law to Facts**

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defense of retraction does not apply.

To decide this issue, you must determine whether the state has proved, beyond a reasonable doubt, that either—

1. the defendant did not retract his false statement;
2. the retraction was made only after completion of the testimony at the official proceeding; or
3. the retraction was made only after it became manifest that the falsity of the statement would be exposed.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1, 2, or 3 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1, 2, or 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense, and if you believe, beyond a reasonable doubt, that the defense of retraction does not apply, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*



**COMMENT**

The offense of aggravated perjury is provided for in [Tex. Penal Code § 37.03](#). The definition of “statement” is based on [Tex. Penal Code § 37.01\(3\)](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#). The definition of “material” is based on [Tex. Penal Code § 37.04\(a\)](#). The definition of “official proceeding” is based on [Tex. Penal Code § 1.07\(a\)\(33\)](#). The definition of “public servant” is based on [Tex. Penal Code § 1.07\(a\)\(41\)](#).

The defense of retraction is provided for in [Tex. Penal Code § 37.05](#).

**Optional Language Regarding Two-Witness Rule.** The relevant statutes unit of this instruction includes optional text regarding the two-witness rule established by [Tex. Code Crim. Proc. art. 38.18\(a\)](#). See CPJC 62.1 for more information about how to instruct the jury under article 38.18(a).

**CPJC 62.5     Instruction—Aggravated Perjury by Inconsistent Statements****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of aggravated perjury. Specifically, the accusation is that the defendant, with intent to deceive and with knowledge of the statements' meaning, made two inconsistent statements under oath, one of the two statements necessarily being false, the first of such statements being [*insert substance of the first statement*], and the second of such statements being [*insert substance of the second statement*], and the statements were required or authorized by law to be made under oath, were made during or in connection with an official proceeding [*insert, if alleged, the name of the court or public servant by whom the oath was administered*], and were material to the proceeding [*insert any allegation of how the statement was material*].

**Relevant Statutes**

A person commits an offense if the person commits perjury and the false statement is made during or in connection with an official proceeding and is material.

A person commits perjury if the person, with intent to deceive and with knowledge of the statements' meaning, makes two inconsistent statements under oath, one of which is necessarily false, and the statements were required or authorized by law to be made under oath.

The state is not required to prove which of the two statements is false.

To prove that the defendant is guilty of aggravated perjury, the state must prove, beyond a reasonable doubt, eight elements. The elements are that—

1. the defendant made two statements;
2. the two statements could not both be true;
3. both statements were made under oath;
4. both statements were required or authorized by law to be made under oath;
5. the defendant made the statements with knowledge of their meaning;

6. the defendant had the intent to deceive;
7. each statement was made during or in connection with an official proceeding; and
8. the statements were material.

*[Include the following if raised by the evidence.]*

It is not a defense to prosecution that the defendant mistakenly believed the statement to be immaterial.

*[Include the following if raised by the evidence.]*

It is not a defense that the oath was administered or taken in an irregular manner.

*[Include the following if raised by the evidence.]*

It is not a defense that there was some irregularity in the appointment or qualification of the person who administered the oath.

*[Include the following if raised by the evidence.]*

It is not a defense that a document was not sworn to if the document contains a recital that it was made under oath, the declarant was aware of the recital when he signed the document, and the document contains the signed jurat of a public servant authorized to administer oaths.

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of aggravated perjury.

### **Definitions**

#### *Statement*

“Statement” means any representation of fact.

#### *Intent to Deceive*

“Intent to deceive” means the conscious objective or desire to deceive.

*Knowledge of a Statement's Meaning*

“Knowledge of a statement’s meaning” means awareness of the meaning of the statement.

*Material*

A statement is “material” if it could have affected the course or outcome of the official proceeding.

*Official Proceeding*

“Official proceeding” means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

*Public Servant*

“Public servant” means a person elected, selected, appointed, employed, or otherwise designated, even if he has not yet qualified for office or assumed his duties, as—

1. an officer, employee, or agent of government;
2. a juror or grand juror;
3. an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;
4. an attorney at law or notary public when participating in the performance of a governmental function;
5. a candidate for nomination or election to public office; or
6. a person who is performing a governmental function under a claim of right although he is not legally qualified to do so.

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, eight elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date] made the statement [insert substance of the first statement], and on or about [date] made the statement [insert substance of the second statement];
2. the two statements could not both be true;
3. both statements were made under oath;

4. both statements were required or authorized by law to be made under oath;
5. the defendant made the statements with knowledge of their meaning;
6. the defendant had the intent to deceive;
7. each statement was made during or in connection with an official proceeding [*if alleged, insert details of official proceeding*]; and
8. the statements were material [*insert any allegation of how the statement was material*].

You must all agree on elements 1 through 8 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 8 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the eight elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

The offense of aggravated perjury is provided for in [Tex. Penal Code § 37.03](#). The definition of “statement” is based on [Tex. Penal Code § 37.01\(3\)](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#). The definition of “material” is based on [Tex. Penal Code § 37.04\(a\)](#). The definition of “official proceeding” is based on [Tex. Penal Code § 1.07\(a\)\(33\)](#). The definition of “public servant” is based on [Tex. Penal Code § 1.07\(a\)\(41\)](#).

**Whether Both Statements Must Be Material.** [Tex. Penal Code § 37.06](#) allows the state to prove falsity by two inconsistent statements and provides that the jury does not have to decide which of the two inconsistent statements is the false one. If the jury does not decide which statement is false, the state has to prove both statements meet all of the other elements of perjury or aggravated perjury. For aggravated perjury, this includes the element of materiality.

Sometimes, however, the evidence will be clear enough that the jury could decide, beyond a reasonable doubt, that one of the statements is the false one. When this occurs in an aggravated perjury case, the jury does not have to find that both statements are material, only that the *false* statement is. The Committee believed that this

occurrence would be fairly rare and that it would complicate the aggravated perjury instruction to provide for this possibility in every case. That said, when the jury is likely to find one statement is clearly the false one and also that the other statement was not material, the state may be entitled to an additional instruction that allows the jury to convict the defendant for the single false, material statement.

**Defense of Retraction.** The defense of retraction included in the instruction at CPJC 62.4 could be modified and incorporated into this instruction, as well.

## CPJC 62.6 General Comments on False Report

**Culpable Mental State.** Texas Penal Code section 37.08 requires proof that the accused acted “knowingly” in giving a false report to a peace officer, federal special investigator, or law enforcement employee. Case law and the language of the statute indicate that this culpable mental state applies to both making the statement and the statement’s falsity. *Wood v. State*, 577 S.W.2d 477, 480 (Tex. Crim. App. 1978) (conviction for making false statement that officer was intoxicated reversed and defendant acquitted; evidence insufficient to show defendant knew officer in fact was not intoxicated). The Committee drafted its instruction on the assumption that this is the case.

**Definition of “Material.”** The false statement must be proved to be “material to a criminal investigation.” Texas Penal Code section 37.04(a) contains a definition of when a statement is material, but this is drafted in terms suggesting it applies only to aggravated perjury under [Tex. Penal Code § 37.03\(a\)](#). Section 37.07(a) defines the word in terms of its effect on the “official proceeding” rather than the criminal investigation, which is the focus of [Tex. Penal Code § 37.08](#).

The Committee considered a definition drawing upon [Tex. Penal Code § 37.04\(a\)](#). Such a definition might provide:

A statement is “material to a criminal investigation” if the statement could affect the course or outcome of the investigation.

This definition, however, did not seem to the Committee to be useful or specific enough to justify deviation from the general rule that terms undefined in the Penal Code are to be interpreted by juries as having their common, everyday meanings.

**Effort to Obtain Redress for Wrongful Official Behavior.** If a prosecution for false report is based on a statement possibly made as part of an effort to obtain redress for wrongful official conduct, special care is necessary to avoid basing criminal liability on activity protected by the right to seek redress for grievances protected by article I, section 27, of the Texas Constitution. *Wood*, 577 S.W.2d 477, and *McGee v. State*, 671 S.W.2d 892 (Tex. Crim. App. 1984), can be read as holding that in such cases, the jury must be told that the state must prove, in addition to the statutory elements of the crime, that (1) the false statement was made in “bad faith,” and (2) the false statement was made for reasons other than to obtain action on a valid grievance. *See Zahorik v. State*, No. 14-13-00763-CR, 2015 WL 5042105 (Tex. App.—Houston [14th Dist.] Aug. 25, 2015, no pet.) (hypothetical jury instruction used to determine sufficiency of evidence on appeal should contain requirements suggested by *Wood* and *McGee*).

On the other hand, *Wood* and *McGee* can be read as requiring only that special care must be taken to assure that sufficient evidence supports a jury finding that the defendant actually knew that the statement constituting the offense was false. Further, this requirement may be one applied only on appellate review for evidence sufficiency and thus not one that should be included in the jury instructions.

The Committee was unable to determine with reasonable confidence that *Wood* and *McGee*, when they applied, required any particular jury instruction. Thus, the Committee chose not to attempt to address how, under one of several possible readings of these decisions, they might increase the state's burden of proof under this offense in a manner that might have to be reflected in the jury instructions.



**CPJC 62.7 Instruction—False Report to Peace Officer****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of making a false report to law enforcement. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., knowingly and with intent to deceive made to [name], a peace officer conducting a criminal investigation, a false statement that was material to the criminal investigation*].

**Relevant Statutes**

A person commits an offense if the person, with intent to deceive, knowingly makes a false statement that is material to a criminal investigation and makes the statement to a peace officer or federal special investigator conducting the investigation or to any employee of a law enforcement agency who is authorized by the agency to conduct the investigation and whom the defendant knows is conducting the investigation.

To prove that the defendant is guilty of making a false report to law enforcement, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant knowingly made a false statement;
2. the statement was made to a peace officer or federal special investigator conducting the investigation or to any employee of a law enforcement agency who is authorized by the agency to conduct the investigation and whom the defendant knows is conducting the investigation;
3. the statement was material to a criminal investigation; and
4. the defendant had the intent to deceive.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of making a false report to law enforcement.

## Definitions

### *Knowingly Making a False Statement*

“Knowingly making a false statement” means to make a false statement with awareness that the statement is being made and that it is false.

### *Intent to Deceive*

“Intent to deceive” means the conscious objective or desire to deceive.

### *Statement*

“Statement” means any representation of fact.

### *Law Enforcement Agency*

“Law enforcement agency” means an agency of the state or an agency of a political subdivision of the state authorized by law to employ peace officers.

## Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [*county*] County, Texas, on or about [*date*], knowingly made a false statement;
2. the statement was made to [*name*], [a peace officer/*insert other type of officer or investigator*] conducting a criminal investigation;
3. the statement was material to the criminal investigation; and
4. the defendant had the intent to deceive.

You must all agree on elements 1 through 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 4 above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

**COMMENT**

Making a false report to a peace officer is prohibited by and defined in [Tex. Penal Code § 37.08](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#). The definition of “statement” is from [Tex. Penal Code § 37.01\(3\)](#). The definition of “law enforcement agency” is from [Tex. Code Crim. Proc. art. 59.01](#).

## CPJC 62.8 General Comments on Tampering with or Fabricating Physical Evidence

There are four major ways of committing the offense of tampering with physical evidence under [Tex. Penal Code § 37.09](#). They include (1) altering, destroying, or concealing a record, document, or thing when one knows an investigation or official proceeding is pending ([Tex. Penal Code § 37.09\(a\)\(1\)](#)); (2) making, presenting, or using a false record, document, or thing with the intent to affect the outcome of an investigation or official proceeding when one knows an investigation or official proceeding is pending ([Tex. Penal Code § 37.09\(a\)\(2\)](#)); (3) altering, destroying, or concealing a record, document, or thing with intent to impair its verity, legibility, or availability in any subsequent investigation or official proceeding when one knows that an offense has been committed ([Tex. Penal Code § 37.09\(d\)\(1\)](#)); and (4) failing to report a human corpse observed under circumstances in which a reasonable person would believe an offense has been committed and knows or reasonably should have known a law enforcement agency is not aware of the existence or location of the corpse ([Tex. Penal Code § 37.09\(d\)\(2\)](#)).

An offense under section (a) or (d)(1) is a third-degree felony unless the thing altered, destroyed, or concealed is a human corpse. In that event, the offense is a felony of the second degree. The offense under section 37.09(d)(2) is a class A misdemeanor.

**Texas Penal Code Section 37.09(c–1) Defense.** The defense provided for in [Tex. Penal Code § 37.09\(c–1\)](#) is puzzling. It provides for a defense if the thing involved was “visual material prohibited under [Tex. Penal Code § 43.261](#) that was destroyed as described by Subsection (f)(3)(B) of that section.” Section 43.261(f)(3) does not have a (B); it is not subdivided. Section 43.261 prohibits promotion or possession of certain material by a minor. Subsection (f) creates a defense containing three “elements,” one of which is 43.261(f)(3). Subsection c–1 was added to section 37.09 by the 2011 legislation that created section 43.261. The intent appears to have been to permit a minor to destroy material in a manner eliminating liability under section 43.261 without thereby incurring liability under section 37.09. Common sense suggests the subsection c–1 defense in section 37.09 should incorporate all three elements of the section 43.261(f) defense, but by referring only to section 43.261(f)(3)(B) it does not do that.

Given the limited circumstances in which the defense could apply and the difficulty of accurately reflecting the statutory meaning, the Committee decided not to offer an instruction on the defense.

**Culpable Mental States.** Texas Penal Code section 37.09(a)(1) requires that the defendant, knowing that an investigation or official proceeding is pending or in progress, take the action described in the statute to impair a record, document, or thing with

the specific intent to impair its evidentiary value either in the investigation or before an official proceeding. [Tex. Penal Code § 37.09\(a\)\(1\)](#).

Adequate explanation of the required culpable mental states is particularly important, as the court of criminal appeals has distinguished between intent and knowledge in applying this offense. In *Stewart v. State*, [240 S.W.3d 872](#), 874 (Tex. Crim. App. 2007), the defendant, a police officer, returned to the arrested person (Lavender) one of several marijuana buds seized from her, after she and the officers agreed to pursue the possibility of her acting as an informant in lieu of prosecution. Reversing the conviction (although by a close 5-to-4 vote), the court explained:

[T]he evidence appears to be legally insufficient to show that appellant had the conscious objective or desire to impair the availability of the marihuana as evidence. The missing marihuana bud would not have changed the category of the offense, and the remaining marihuana was certainly enough to convict Lavender, if the State was interested in pursuing a prosecution. Indeed, appellant's conduct appears to have been motivated by the belief that Lavender would escape prosecution by becoming an informant, and as a result, the entire quantity of marihuana would be destroyed anyway.

*Stewart*, [240 S.W.3d at 874](#). The court of criminal appeals disapproved of the intermediate court's reliance on evidence that persuaded it that Stewart knew his actions would impair the availability of the bud as evidence. The court emphasized that the state must prove intent, not simply knowledge.

**Knowledge that Investigation or Proceeding Is “Pending.”** The first two ways of committing the offense require proof that the defendant knew an investigation or official proceeding was either “in progress” or “pending.” If the state relies on proof that the investigation or proceeding was “pending,” must or may the instructions define “pending”? No case law has addressed the question.

Dicta in *Lumpkin v. State*, [129 S.W.3d 659](#), 663 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd), indicated that pending means “impending or about to take place.” This definition has been accepted in other cases which, like *Lumpkin*, involved challenges to the sufficiency of the evidence. See *Thurston v. State*, No. 02-13-00242-CR, 2014 WL 3536955 (Tex. App.—Fort Worth July 17, 2014) (per curiam) (not designated for publication), *pet. dismissed as improvidently granted*, [465 S.W.3d 255](#) (Tex. Crim. App. 2015) (per curiam). In *Thurston*, the state's evidence was that Thurston shot and killed the victim and then, two days later, moved the body to a nearby location close to some railroad tracks. He was aware that no one had seen him kill the victim and only his girlfriend knew he had done so. No investigation was in progress, of course, and Thurston argued none was pending and thus he could not know one was pending. It would seem the jury's attention might have focused on whether the investigation into either the victim's location or death, which was almost certain to occur, was likely to occur soon enough to render that investigation “pending” within the

meaning of the statute. Assuming the correctness of the *Lumpkin* standard, the issue might be whether the investigation was “about to take place.”

On the facts of *Thurston*, an instruction using only the statutory words requiring the jury to determine whether the state proved the investigation was pending and that Thurston knew this would seem to provide the jury with insufficient guidance. Adding the *Lumpkin* explanation that “pending” means impending or about to take place would not provide much additional guidance. It might make clear that some imminence is required, although providing no useful way for a jury to decide how imminent the defendant must have believed the investigation to be.

The Committee concluded that “pending” cannot under existing law be defined in the instruction.

**Work Product or Privilege Exception.** [Tex. Penal Code § 37.09\(b\)](#) provides that section (a) is not applicable “if the record, document, or thing concealed is privileged or is the work product of the parties to the investigation or official proceeding.” It is applicable only if the state alleges concealment. Thus it does not apply if the state alleges alteration or destruction. *See Cuadra v. State*, [715 S.W.2d 723](#), 724 (Tex. App.—Houston [14th Dist.] 1986, pet. ref’d) (“[W]hether a document is privileged is relevant only when that document has been concealed.”).

The Committee concluded that the provision is unlikely to be frequently applicable and its content is quite unclear. Consequently, the Committee did not attempt to draft an instruction covering it.

**Application to Certain Traffic Stop Situations.** The Committee had some concern whether an instruction in the statutory terms would lead juries to the correct results in cases in which a person stopped for a traffic matter acts to alter, destroy, or conceal drugs or weapons. This concern is based on the analysis in *Williams v. State*, [270 S.W.3d 140](#) (Tex. Crim. App. 2008).

In *Williams*, an officer approached the car in which Williams was sitting and began to frisk him. A crack pipe dropped to the ground but did not break; Williams stomped on it, breaking it. His indictment alleged that “knowing that an investigation was in progress, to-wit: checking [Appellant] for weapons, [Appellant] intentionally and knowingly destroy[ed] drug paraphernalia, to-wit: a crack pipe, with intent to impair its verity and availability as evidence in the investigation.” *Williams*, [270 S.W.3d at 143](#). It did *not* allege he intended to impair the pipe’s availability in a pending investigation into possession of crack.

Upholding the conviction, the court of criminal appeals appears to reject the court of appeals’s analysis that a drug investigation began when the officer noticed the pipe and Williams both knew of that and intended to render the pipe unavailable in that investigation. Rather, it explained:

[T]he title of the investigation and the evidence destroyed need not match in an indictment alleging an offense under section 37.09(a)(1), as long as the offender destroyed a thing with the intent to impair its availability as evidence in an investigation that he knows is in progress. In this case, the elements of the offense are satisfied. During a weapons pat-down, Appellant stepped on the crack pipe the instant it fell into the officer's view, crushing it into pieces. Considering the evidence in the light most favorable to the jury's verdict, a rational jury could have found beyond a reasonable doubt that, knowing a weapons investigation was in progress, Appellant destroyed a crack pipe with the conscious objective to impair its availability as evidence in the investigation.

*Williams*, 270 S.W.3d at 145.

*Williams* seems to reason that if an officer is investigating a traffic or similar matter and the suspect anticipates the officer will begin a drug investigation if he finds evidence of drugs, a suspect who destroys drugs before the officer becomes aware of those drugs has the intent to render the drugs unavailable *in the traffic investigation*. The analysis appears to reject *Pannell v. State*, 7 S.W.3d 222 (Tex. App.—Dallas 1999, pet. ref'd) (reversing conviction for throwing marijuana joint out of window during traffic stop because there was no investigation in progress or pending in which the substance could have been evidence). In *Pannell*, there was apparently no evidence that the officer had any suspicions concerning marijuana at the time Pannell discarded the joint.

The result in *Williams* could easily be explained on the theory that the jury could find that once the pipe fell, Williams realized (“knew”) a drug investigation was at least “pending” (since the officer saw it too) and acted with intent to render the pipe unavailable in that investigation. But the state pleaded a weapons investigation in progress.

**Definition of “Destroy.”** There is no statutory definition of the word *destroy*. The sufficiency of evidence to prove destruction was addressed in *Williams*, 270 S.W.3d 140.

In *Williams*, the defendant claimed the crack pipe had not been destroyed within the meaning of the statute because the state recovered and was able to use the pieces of it. The court responded:

That the State introduced the recovered pieces only after showing a complete crack pipe as a demonstrative exhibit indicates that the glass shards and copper mesh filter had lost their identity as a crack pipe and were not recognizable as a crack pipe. Therefore, the crack pipe was destroyed.

*Williams*, 270 S.W.3d at 146. This explanation suggests the word *destroy* might be defined as including any change to an item that causes the item to lose its identity as an item of the sort it originally was or to no longer be recognizable as such an item.

The Committee concluded, however, that any such definition would be one jurors would apply as a matter of common usage and meaning and thus no definition in the instructions would be appropriate.

**Definition of “Falsity.”** The manner of committing the offense provided for in [Tex. Penal Code § 37.09\(a\)\(2\)](#) requires proof of the falsity of the record, document, or thing and that the defendant knew of this falsity. Falsity is not defined by statute but appears to include situations in which a record or document contains false information or assertions.

Some members of the Committee were concerned that the meaning of falsity might not be sufficiently clear without an instructional definition. The Committee, however, concluded that in light of the lack of any statutory definition or clear case law requirement, no definition should be included.



**CPJC 62.9     Instruction—Tampering with Physical Evidence Knowing  
of Pending or Ongoing Investigation or Official Proceeding****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of tampering with or fabricating physical evidence. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., knowing that an investigation, specifically a murder investigation, was pending, concealed a gun by hiding it with the intent to impair its availability in the murder investigation*].

**Relevant Statutes**

A person commits an offense if, knowing that an investigation or official proceeding is pending or in progress, the person alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding.

To prove tampering with or fabricating physical evidence, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant altered, destroyed, or concealed a record, document, or thing;
2. the defendant knew that an investigation or official proceeding was pending or in progress; and
3. the defendant did this with the intent to impair the verity, legibility, or availability of the record, document, or thing as evidence in the investigation or official proceeding.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of tampering with or fabricating physical evidence.

**Definitions***Official Proceeding*

“Official proceeding” means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

*Knowing that an Investigation or Official Proceeding Is Pending or in Progress*

A person knows that an investigation or official proceeding is pending or in progress if the person is aware that the investigation or proceeding is pending or in progress.

*Intent to Impair the Verity, Legibility, or Availability of a Record, Document, or Thing as Evidence in the Investigation or Official Proceeding*

A person acts with intent to impair the verity, legibility, or availability of a record, document, or thing as evidence in the investigation or official proceeding if the person has the conscious desire to impair the verity, legibility, or availability of the record, document, or thing as evidence in an investigation or official proceeding.

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], [insert specific allegations, e.g., concealed a gun by hiding it];
2. the defendant knew that [a murder investigation/an investigation/an official proceeding] was [pending/in progress]; and
3. the defendant did this with the intent to impair the [verity/legibility/availability] of the [insert specific evidence, e.g., gun] as evidence in the [investigation/official proceeding].

You must all agree on elements 1, 2 and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the three elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

**COMMENT**

The offense of tampering with or fabricating physical evidence is provided for in [Tex. Penal Code § 37.09\(a\)\(1\)](#). The definition of “official proceeding” is based on [Tex. Penal Code § 1.07\(a\)\(33\)](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#).

**CPJC 62.10 Instruction—Tampering with Physical Evidence with Intent to Affect Pending or Ongoing Investigation or Official Proceeding**

**INSTRUCTIONS OF THE COURT**

**Accusation**

The state accuses the defendant of having committed the offense of tampering with or fabricating physical evidence by making, presenting, or using a record, document, or thing that the defendant knew to be false. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., knowing that an investigation, specifically a murder investigation, was in progress, presented a birth certificate with knowledge of its falsity and with intent to affect the course or outcome of the investigation*].

**Relevant Statutes**

A person commits an offense if, knowing that an investigation or official proceeding is pending or in progress, the person makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent to affect the course or outcome of the investigation or official proceeding.

To prove tampering with or fabricating physical evidence, the state must prove, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant made, presented, or used a record, document, or thing;
2. the record, document, or thing was false;
3. the defendant knew an investigation or official proceeding was pending or in progress;
4. the defendant had knowledge of the falsity of the record, document, or thing; and
5. the defendant had the intent to affect the course or outcome of the investigation or official proceeding.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of tampering with or fabricating physical evidence.

## Definitions

### *Official Proceeding*

“Official proceeding” means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

### *Knowing that an Investigation or Official Proceeding Is Pending or in Progress*

A person knows that an investigation or official proceeding is pending or in progress if the person is aware that the investigation or proceeding is pending or in progress.

### *Intent to Affect the Course or Outcome of the Investigation or Official Proceeding*

A person acts with intent to affect the course or outcome of an investigation or official proceeding if the person has the conscious desire to affect the course or outcome of an investigation or official proceeding.

## Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, five elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], presented [insert specific evidence, e.g., a birth certificate];
2. the [insert specific evidence, e.g., birth certificate] was false;
3. the defendant knew that [insert specific type of investigation or proceeding, e.g., a murder investigation], an [investigation/official proceeding], was [pending/in progress];
4. the defendant had knowledge of the falsity of the [insert specific evidence, e.g., birth certificate]; and
5. the defendant had the intent to affect the course or outcome of the [investigation/official proceeding].

You must all agree on elements 1, 2, 3, 4 and 5 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the five elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the five elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

#### COMMENT

The offense of tampering with or fabricating physical evidence by making, presenting, or using a record, document, or thing that the defendant knew to be false is provided for in [Tex. Penal Code § 37.09\(a\)\(2\)](#). The definition of “official proceeding” is based on [Tex. Penal Code § 1.07\(a\)\(33\)](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#).

**CPJC 62.11**    **Instruction—Knowingly Tampering with Physical Evidence with Intent to Affect Any Subsequent Investigation or Official Proceeding**

**INSTRUCTIONS OF THE COURT**

**Accusation**

The state accuses the defendant of having committed the offense of tampering with or fabricating physical evidence. Specifically, the accusation is that the defendant, knowing that an offense had been committed, [*insert specific allegations, e.g., altered a birth certificate*] with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation or official proceeding related to the offense.

**Relevant Statutes**

A person commits an offense if, knowing that an offense has been committed, alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation or official proceeding related to that offense.

To prove tampering with or fabricating physical evidence, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1.    the defendant altered, destroyed, or concealed a record, document, or thing;
2.    the defendant knew an offense had been committed; and
3.    the defendant intended to impair the veracity, legibility, or availability of the record, document, or thing as evidence in any subsequent investigation or official proceeding related to the offense.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of tampering with or fabricating physical evidence.

**Definitions**

*Official Proceeding*

“Official proceeding” means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

*Knowing that an Offense Has Been Committed*

A person knows that an offense has been committed if the person is aware that an offense has been committed.

*Intent to Impair the Verity, Legibility, or Availability of a Record, Document, or Thing as Evidence in the Investigation or Official Proceeding*

A person acts with intent to impair the verity, legibility, or availability of the record, document, or thing as evidence in the investigation or official proceeding if the person has the conscious desire to impair the verity, legibility, or availability of the record, document, or thing as evidence in an investigation or official proceeding.

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], [insert specific allegations, e.g., altered a birth certificate];
2. the defendant knew an offense had been committed; and
3. the defendant intended to impair the [verity/legibility/availability] of the [insert specific evidence, e.g., birth certificate] as evidence in any subsequent [investigation/official proceeding] related to the offense.

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the three elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

**COMMENT**

The offense of tampering with or fabricating physical evidence by altering, destroying, or concealing a record, document, or thing with the intent to impair its verity, legibility, or availability in any subsequent investigation or official proceeding is



provided for in [Tex. Penal Code § 37.09\(d\)\(1\)](#). The definition of “official proceeding” is based on [Tex. Penal Code § 1.07\(a\)\(33\)](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#).

**CPJC 62.12 Instruction—Tampering with Physical Evidence by Failing to Report a Corpse****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of tampering with or fabricating physical evidence by failing to report a human corpse. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., observed a human corpse in a field*] under circumstances in which a reasonable person would believe that an offense has been committed, the defendant knew or should have reasonably known that a law enforcement agency was not aware of the existence or location of the corpse, and the defendant failed to report the existence or location of the corpse to a law enforcement agency.

**Relevant Statutes**

A person commits an offense if he observes a human corpse under circumstances in which a reasonable person would believe that an offense has been committed, knows or reasonably should know that a law enforcement agency is not aware of the existence or location of the corpse, and fails to report the existence or location of the corpse to a law enforcement agency.

To prove tampering with or fabricating physical evidence by failing to report a corpse, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant observed a human corpse;
2. the circumstances were such that a reasonable person would believe that an offense had been committed;
3. the defendant knew or reasonably should have known that a law enforcement agency was not aware of the existence or location of the corpse; and
4. the defendant failed to report the existence and location of the corpse to a law enforcement agency.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of tampering with or fabricating physical evidence by failing to report a corpse.

## Definitions

### *Human Corpse*

“Human corpse” includes any portion of a human corpse, the cremated remains of a human corpse, or any portion of the cremated remains of a human corpse.

### *Knew that a Law Enforcement Agency Was Not Aware of the Existence or Location of the Corpse*

“Knew that a law enforcement agency was not aware of the existence or location of the corpse” means that the person was aware that a law enforcement agency was not aware of the existence or location of the corpse.

## Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], observed a human corpse; and
2. the circumstances were such that a reasonable person would believe that an offense had been committed; and
3. the defendant [knew/reasonably should have known] that a law enforcement agency was not aware of the existence or location of the corpse; and
4. the defendant failed to report the existence of and location of the corpse to a law enforcement agency.

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the four elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

**COMMENT**

The offense of tampering with or fabricating physical evidence by failing to report the existence and location of a corpse to a law enforcement agency is provided for in [Tex. Penal Code § 37.09\(d\)\(2\)](#). The definition of “corpse” is based on [Tex. Penal Code § 42.08](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#).

## CPJC 62.13 General Comments on Tampering with a Governmental Record

The instructions at CPJC 62.15, CPJC 62.17, and CPJC 62.19 set out the three major ways of committing the offense of tampering with a governmental record under [Tex. Penal Code § 37.10](#): (1) making a false entry or alteration ([Tex. Penal Code § 37.10\(a\)\(1\)](#)); (2) making, presenting, or using a false document ([Tex. Penal Code § 37.10\(a\)\(2\)](#)); and (3) making, presenting, or using a false governmental record ([Tex. Penal Code § 37.10\(a\)\(5\)](#)).

**Incongruence between the Title of the Offense and Manner of Committing It.** The title of the offense is misleading as applied to some of the ways in which the offense can be committed. Only the first and third methods listed above actually require the thing involved to be a governmental record. Only the first involves what would arguably be tampering as that term is generally understood. Perhaps it is awkward to tell the jury the defendant has been charged with tampering with a governmental record and then set out the definition of a crime that does not meet that description. Some practitioners may find it more accurate to begin the accusation paragraph for an instruction under section 37.10(a)(2) as follows:

The state accuses the defendant of using an item with intent that it be taken as a genuine governmental record.

Similarly, an instruction under section 37.10(a)(5) might more helpfully begin:

The state accuses the defendant of making, presenting, or using a false governmental record.

At the same time, if the trial participants have already been referring to the offense by its caption or indeed have explained the discrepancy to jurors, modifying the language may be unnecessary.

**Similar Sounding but Legally Distinct Manners and Means.** The three major manners and means of committing tampering with a governmental record all involve false records, but there are important differences: the first method (under [Tex. Penal Code § 37.10\(a\)\(1\)](#)) involves putting false information in what is already a real governmental record, the second (under [Tex. Penal Code § 37.10\(a\)\(2\)](#)) involves using a fake governmental record, and the third (under [Tex. Penal Code § 37.10\(a\)\(5\)](#)) involves using a real governmental record that has false information.

The subtlety of these distinctions can sometimes result in prosecutions under the wrong statutory manner and means. False information in a fake governmental record does not constitute an offense under section 37.10(a)(1) or (a)(5) because both subsections require a real governmental record. *Thompson v. State*, 215 S.W.3d 557, 559 (Tex. App.—Texarkana 2007, no pet.) (rendering acquittal for false data in fake driver’s licenses prosecuted under [Tex. Penal Code § 37.10\(a\)\(1\)](#) and suggesting same for

prosecution under subsection (a)(5)—because both require a real governmental record—but indicating subsection (a)(2) is the proper one). Also, for a prosecution under section 37.10(a)(1), the governmental record at issue must already be a governmental record at the time of the false entry. This can sometimes pose a problem for prosecutions relying on the “received by government” definition of “governmental record” because such documents—for instance, applications, petitions, or court filings—cannot be said to be governmental records until that event occurs. Thus, evidence that the defendant made a false entry in an application that has not yet been submitted to the government at the time of the false entry will not constitute tampering under section 37.10(a)(1). *See Ex parte Graves*, 436 S.W.3d 395, 399 (Tex. App.—Texarkana 2014, pet. ref’d). But it would meet the requirements of section 37.10(a)(5), which criminalizes the act of using a governmental record containing false information. *See State v. Vasilas*, 187 S.W.3d 486, 491 (Tex. Crim. App. 2006) (explaining in prosecution under section 37.10(a)(5) that petition for expunction became a governmental record once the court received it—an event that occurred simultaneously with the defendant’s use of the record). No further jury instructions are warranted to explain these differences because they are inherent in the plain language of the statute. That said, practitioners should pay attention to the differences so they may properly guide the jury.

**Intent to Defraud or Harm.** Generally, the offense is a class A misdemeanor. If intent to defraud or harm another is proved, however, it is a state jail felony. [Tex. Penal Code § 37.10\(c\)\(1\)](#). Also, if the governmental record is a license, certificate, or similar document issued by government, it is a third-degree felony, but intent to defraud or harm makes it a second-degree felony. [Tex. Penal Code § 37.10\(c\)\(2\)\(A\)](#). In the instructions that follow, intent to defraud or harm is an optional element to be included if alleged in the charging instrument and raised by the evidence. The instructions assume that the trial court is not also submitting a lesser-included offense of tampering *without* intent to defraud or harm. As a result, the state’s failure to prove intent to harm or defraud results in an acquittal. Should the lesser be submitted, failure of proof on the issue of intent to harm or defraud brings the lesser-included offense into play, and the instructions should be modified accordingly. See CPJC 6.2 in *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions*.

## CPJC 62.14 Making a False Entry or False Alteration

This manner of committing the offense requires the document at issue to be a real governmental record. Putting fictitious information in a fake driver's license, for example, does not constitute tampering under [Tex. Penal Code § 37.10\(a\)\(1\)](#) because the license was not issued by government and thus is not a "governmental record" under the statutory definition. [Tex. Penal Code § 37.01\(2\)\(C\)](#); *Thompson v. State*, 215 S.W.3d 557, 559 (Tex. App.—Texarkana 2007, no pet.) (rendering acquittal for prosecution under section 37.10(a)(1) and suggesting same for prosecution under section 37.10(a)(5)—because both require an actual governmental record—but indicating section 37.10(a)(2) is the proper one to prosecute use of counterfeit governmental records).

Section 37.10(a)(1) also requires that the document be a governmental record at the time the defendant makes the false entry in or alteration of the document. *Ex parte Graves*, 436 S.W.3d 395, 399 (Tex. App.—Texarkana 2014, pet. ref'd); *Pokladnik v. State*, 876 S.W.2d 525, 527 (Tex. App.—Dallas 1994, no pet.); *Constructors Unlimited v. State*, 717 S.W.2d 169, 174 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd). Section 37.10(a)(5), which prosecutes the use of the governmental record rather than the entry of false information, lacks this requirement. *See State v. Vasilas*, 187 S.W.3d 486, 491 (Tex. Crim. App. 2006) (contrasting subsections 37.10(a)(1) and (5)).

**Culpable Mental State.** The court of criminal appeals has not considered what element or elements the requirement of "knowingly" applies to: (1) making the entry or alteration, (2) the falsity (of the entry or alteration), or (3) the nature of the thing as a governmental record.

The Committee agreed that the court of criminal appeals would apply "knowingly" to at least the first two elements. Grammatically, "knowingly" modifies the conduct element "making" and likely also continues down the phrase to modify the circumstance that the entry or alteration was false, which may be the gravamen of this manner of committing the offense. But the Committee split on whether the defendant would also be required to know that the law has classified a particular document (like a food stamp application) as a governmental record. For some members, this came too close to requiring actual knowledge of the law. *See Tex. Penal Code § 8.03(a)* ("It is no defense to prosecution that the actor was ignorant of the provisions of any law after the law has taken effect."). Also, the legislature specified further mental states in section 37.10(a)(2). The fact that it did not do so in relation to the governmental record element in (a)(1) may indicate a mental state was not intended to apply.

A smaller subset of the Committee believed knowledge should apply to the governmental record element. The definition of "governmental record" in [Tex. Penal Code § 37.01\(2\)\(A\)](#) includes "anything belonging to, received by, or kept by government for information," and thus may encompass incidental papers or lists in a government office that an office worker may not recognize as qualifying. This same concern was

raised in *Chambers v. State*, 523 S.W.3d 681, 687–88 (Tex. App.—Corpus Christi 2017, pet. granted), although the court of appeals ultimately found the defense in section 37.10(f) alleviated these concerns. These members believed the gravamen of the offense extended to the knowledge element and would set out the elements as follows:

The elements are that—

1. the defendant made a false [entry/alteration] in a document or record;
2. the defendant knew he was making the [entry/alteration] in the document or record and that it was false;
3. the document or record was a governmental record; [and]
4. the defendant knew the document or record was a governmental record [; and/.]

*[Include the following element if pleaded.]*

5. the defendant had the intent to defraud or harm another.

**Defense of No Effect on Government Purpose.** *Tex. Penal Code § 37.10(f)* provides a defense to prosecution under section 37.10(a)(1), (2), and (5) if the jury finds, or has a reasonable doubt that, “the false entry or false information could have had no effect on the government’s purpose for requiring the governmental record.” As the court of appeals in *Chambers* observed, an implicit element of this defense is that the government required the record in the first place. *Chambers*, 523 S.W.3d at 687. Since the burden is on the state to disprove it, the state would have to show: (1) the government required the record; (2) the government had a purpose for requiring the record; and (3) the false entry or information could have had an effect on that purpose.

The third element only requires that the false entry “could have had” an effect on the government’s purpose. This may include situations of false entries that in fact had no effect but could have had an effect under a different set of circumstances. *See Baumgart v. State*, No. 01-14-00320-CR, 2015 WL 5634246 (Tex. App.—Houston [1st Dist.] Oct. 5, 2016, pet. ref’d) (not designated for publication) (upholding jury’s rejection of defense despite evidence that officials intercepted falsified governmental record so that it was never processed). Not only that, there is no requirement that the effect be negative, although including as an “effect” a situation where a false entry actually better facilitates the government’s purpose for the record could perhaps be an absurd result. *See Ex parte White*, 506 S.W.3d 39, 42 (Tex. Crim. App. 2016) (applying the plain meaning of a statute’s text unless it is ambiguous or leads to absurd results the legislature could not have intended).

The defense refers to “false entry or false information” but this second term—“false information”—is not defined or referenced anywhere else in the statute. Because the



defense applies to manners of committing the offense that do not require a false entry (like when the entire purported governmental record is fake or inaccurate), the legislature may have chosen “false information” to invoke these diverse situations. In any event, the ordinary meaning of the phrase should provide jurors sufficient guidance in applying the defense.

**CPJC 62.15 Instruction—Tampering with a Governmental Record—  
Making a False Entry or Alteration****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of tampering with a governmental record. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., knowingly made a false entry in a governmental record, specifically a vehicle certificate of title, by misstating the mileage*] [, with the intent to defraud or harm another].

**Relevant Statutes**

A person commits an offense if the person knowingly makes a false entry in, or false alteration of, a governmental record [with the intent to defraud or harm another].

To prove that the defendant is guilty of tampering with a governmental record, the state must prove, beyond a reasonable doubt, the following elements. The elements are that—

1. the defendant made a false [entry/alteration] in a document or record;
2. the defendant knew he was making the [entry/alteration] in the document or record and that it was false; [and]
3. the document or record was a governmental record [; and/.]

*[Include the following element if pleaded.]*

4. the defendant had the intent to defraud or harm another.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of tampering with a governmental record.

**Definitions***Governmental Record*

*[Include relevant parts of definition as applicable.]*

“Governmental record” means—

1. anything belonging to, received by, or kept by government for information, including a court record;
2. anything required by law to be kept by others for information of government; or
3. a license, certificate, permit, seal, title, letter of patent, or similar document issued by government, by another state, or by the United States.

#### *Government*

“Government” means the state; a county, municipality, or political subdivision of the state; or any branch or agency of the state, county, municipality, or political subdivision.

#### *Knowingly Making a False [Entry in/Alteration of] a Governmental Record*

The phrase *knowingly makes a false [entry in/alteration of] a governmental record* means a person was aware both that he was making an [entry in/alteration of] something and that the entry or alteration was false.

#### *Harm*

“Harm” means anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.

#### *Intent to Defraud or Harm Another*

“Intent to defraud or harm another” means the conscious objective or desire to defraud or harm another.

*[Include presumption of intent to harm or defraud another if raised by the evidence; see CPJC 62.20.]*

### **Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, [three/four] elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], made a false [entry in/alteration of] [*insert specifics, e.g., a certificate of title*] by [*insert specifics, e.g., misstating the mileage*];

2. the defendant knew he was making the [entry/alteration] and that it was false; [and]

3. the [insert specifics, e.g., certificate of title] was a governmental record [; and/.]

*[Include the following element if pleaded.]*

4. the defendant had the intent to defraud or harm another.

You must all agree on elements [1, 2, and 3/1, 2, 3, and 4] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements listed above, you must [find the defendant “guilty”/proceed to consider whether the defendant has proved the defense of no effect on government purpose].

*[Include defense of no effect on government purpose if raised by the evidence; see CPJC 62.21. Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas*

*Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

Tampering with a governmental record is prohibited by and defined in [Tex. Penal Code § 37.10](#). The definition of “governmental record” is from [Tex. Penal Code § 37.01\(2\)](#). The definition of “government” is from [Tex. Penal Code § 1.07\(a\)\(24\)](#). The definition of “harm” is from [Tex. Penal Code § 1.07\(a\)\(25\)](#). For a detailed discussion of the constitutional implications of presumptions in favor of the state, see CPJC 7.1 in *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions*.

**CPJC 62.16 Making or Using a False Thing with the Intent It Be Taken as Genuine**

The thing involved—usually a document—need not at any time actually be a governmental record. But the defendant must act with intent that the document be taken as a genuine governmental record.

**Coincidence of Intent and *Actus Reus*.** Some members of the Committee were concerned that breaking down the elements of this offense into a numbered list might obscure the requirement that all the elements must coincide. They were concerned that in a situation like in *Alfaro-Jiminez v. State*, 536 S.W.3d 579, 585 (Tex. App.—San Antonio 2017, pet. granted on other grounds), jurors might consider a defendant’s intent on a different occasion as sufficient, even if they believed he lacked that intent at the time of the offense. Alfaro-Jiminez asked police to check his wallet for his driver’s license during a traffic stop, and when they did, they also discovered a fake social security card. He was charged with tampering with a governmental record by “using or presenting” the fake social security card. At trial, the defendant testified that he obtained the fake card to use for work many months earlier. Some members were concerned that when jurors are asked to find whether the defendant had the intent that a document be taken as genuine or the intent to harm or defraud, it is not clear that it is his intent at the time of the offense that matters (although intent from an earlier time could be used as evidence of intent at the time of the offense). These members believed that (particularly in cases like *Alfaro-Jiminez*) the requirement of intent could be made clearer by setting out the elements as follows:

1. the defendant used or presented a record, document, or thing;
2. the defendant did so with the intent that it be taken as a genuine governmental record; [and]
3. the defendant knew it was [false/not genuine] [; and/.]

*[Include the following element if pleaded.]*

4. the defendant intended to defraud or harm another when using or presenting the record, document, or thing.

In appropriate cases, the parties could agree to this formulation of the elements as an aid to the jury.

**Understanding “Falsity” and “Genuine.”** This manner and means requires knowledge of the document’s or thing’s “falsity.” [Tex. Penal Code § 37.10\(a\)\(2\)](#). The statute does not define “falsity.” Given the requirement of intent that the document or thing be taken as genuine, the most obvious interpretation of “falsity” is in the sense of being counterfeit, fictitious, or not genuine. It is unclear whether this is the only rea-

sonable interpretation. A document might be counterfeit and be doubly false because it also contains information that is inaccurate or untruthful (i.e., false information in a fake governmental record). But can inaccuracy or untruthfulness be the sole sense in which a document is false and still constitute an offense under section 37.10(a)(2)? To some extent, the harm that this second interpretation of falsity is meant to protect against is already covered by the offenses in sections 37.10(a)(1) and 37.10(a)(5)—although both require that the record be an actual governmental record at the time of the false entries or when the record is used or presented. Section 37.10(a)(2)’s additional mental state of “intent that [the record] be taken as a genuine governmental record” is difficult to square with a fact situation that does not involve a counterfeit record. Can it be said that a governmental record is not “a genuine governmental record” simply because it contains inaccuracies or falsehoods? For some on the Committee, this seemed too strained a reading. For them, section 37.10(a)(2) requires knowledge that the document is a fake governmental record and the intent that others take it as real. Others believed that a jury should not be confined to that understanding of “falsity” and “genuine.” See *Kirsch v. State*, 357 S.W.3d 645, 652 (Tex. Crim. App. 2012) (rejecting definition of “operate” in DWI jury charge for impermissibly guiding jurors’ understanding of the term). A few appellate cases assume that a prosecution under section 37.10(a)(2) could be had even when the record is false only in the sense of being untruthful and no counterfeit record was involved. See *Ex parte Graves*, 436 S.W.3d 395, 397 n.1 (Tex. App.—Texarkana 2014, pet. ref’d) (acquitting defendant who made false entries on document that was not counterfeit and also not yet a governmental record but noting that defendant was *not* charged under section 37.10(a)(2)); *Milam v. State*, No. 01-96-00078-CR, 2001 WL 870030, at \*1 (Tex. App.—Houston [1st Dist.] Aug. 2, 2001, pet. ref’d) (constable’s actual affidavit containing falsehoods prosecuted under section 37.10(a)(2)) (not designated for publication).

In a given case, the parties could agree to instruct jurors more explicitly. For example, they might agree to a definition such as this:

“Knowledge that the record, document, or thing is false” means awareness that the record, document, or thing is not a genuine governmental record.

In absence of such an agreement, however, the Committee did not believe that the terms “falsity” or “genuine” should be limited.

**Disclaimer Defense and Section 37.10(j).** Texas Penal Code section 37.10(j) begins with what is not a defense (merely disclaiming on a document that it is not a governmental document) and eventually states what is a defense (including such a statement of the designated size, color, etc.). The portion indicating what is not a defense is in the relevant statutes unit of CPJC 62.17. A separate unit for the defense is also included. Perhaps there could be situations in which the state is entitled to an instruction that a statement of the sort described does not preclude liability but the

facts do not justify submission of the defense itself. In that event, the paragraph can be kept in the relevant statutes unit and the defense instruction removed.

**CPJC 62.17 Instruction—Tampering with a Governmental Record—  
Making, Presenting, or Using a False Thing with the Intent  
It Be Taken as Genuine**

**INSTRUCTIONS OF THE COURT**

**Accusation**

The state accuses the defendant of having committed the offense of tampering with a governmental record. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., used an insurance card with knowledge of its falsity and with intent that it be taken as a genuine governmental record*].

**Relevant Statutes**

A person commits an offense if the person makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine governmental record [and with the intent to defraud or harm another].

To prove that the defendant is guilty of tampering with a governmental record, the state must prove, beyond a reasonable doubt, [four/five] elements. The elements are that—

1. the defendant made, presented, or used a record, document, or thing;
2. the record, document, or thing was false;
3. the defendant had knowledge that the record, document, or thing was false; [and]
4. the defendant intended that the record, document, or thing be taken as a genuine governmental record [; and/.]

*[Include the following element if pleaded.]*

5. the defendant intended to defraud or harm another.

*[Include the following if raised by the evidence.]*

If these elements are proven, the defendant is guilty of the offense even if the record, document, or thing made, presented, or used displayed or contained the statement “NOT A GOVERNMENT DOCUMENT” or another substantially similar statement intended to alert a person to the falsity of the record, docu-



ment, or thing [, unless the state has failed to prove the disclaimer defense described later in these instructions does not apply to the defendant's situation].

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of tampering with a governmental record.

### **Definitions**

#### *Governmental Record*

*[Include relevant parts of definition as applicable.]*

“Governmental record” means—

1. anything belonging to, received by, or kept by government for information, including a court record;
2. anything required by law to be kept by others for information of government; or
3. a license, certificate, permit, seal, title, letter of patent, or similar document issued by government, by another state, or by the United States.

#### *Government*

“Government” means the state; a county, municipality, or political subdivision of the state; or any branch or agency of the state, county, municipality, or political subdivision.

#### *Harm*

“Harm” means anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.

#### *Intent to Defraud or Harm Another*

“Intent to defraud or harm another” means the conscious objective or desire to defraud or harm another.

#### *Knowledge that the Record, Document, or Thing Is False*

“Knowledge that the record, document, or thing is false” means awareness that the record, document, or thing is false.

*Intent that the Record, Document, or Thing Be Taken as a Genuine Governmental Record*

“Intent that the record, document, or thing be taken as a genuine governmental record” means a person had the conscious objective or desire that the record, document, or thing be taken as a genuine governmental record.

*[Include presumption of intent to harm or defraud another if raised by the evidence; see CPJC 62.20.]*

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, [four/five] elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], [insert specific allegations, e.g., used an insurance card] and it was a record, document, or thing;
2. [insert specific allegations, e.g., the insurance card] was false;
3. the defendant had knowledge that [insert specifics, e.g., the insurance card] was false; [and]
4. the defendant had the intent that [insert specifics, e.g., the insurance card] be taken as a genuine governmental record [; and/.]

*[Include the following element if pleaded.]*

5. the defendant had the intent to defraud or harm another.

You must all agree on elements [1, 2, 3, and 4/1, 2, 3, 4, and 5] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the elements listed above, you must find the defendant “not guilty.”

*[Select one of the following.]*

If you all agree the state has proved, beyond a reasonable doubt, each of the [four/five] elements listed above, you must find the defendant “guilty.”

*[or]*

If you all agree the state has proved, beyond a reasonable doubt, each of the [four/five] elements listed above, you must proceed to consider whether the defense of [insert defense, e.g., disclaimer] applies.

*[Include the following if raised by the evidence.]*

### **Disclaimer**

If you all agree the state has proved, beyond a reasonable doubt, each of the [number] elements listed above, you must next consider whether the defense of disclaimer applies.

### **Relevant Statutes**

It is a defense to prosecution for tampering with a governmental record that—

1. the record, document, or thing made, presented, or used displayed or contained the statement “NOT A GOVERNMENT DOCUMENT” or another substantially similar statement intended to alert a person to the falsity of the record, document, or thing;
2. the statement was printed diagonally;
3. it was printed clearly and indelibly;
4. it was printed on both the front and back of the record, document, or thing;
5. it was printed in solid red capital letters; and
6. it was printed in letters at least one-fourth inch in height.

### **Burden of Proof**

The defendant is not required to prove this defense. Rather, the state must prove, beyond a reasonable doubt, that the defense does not apply.

### **Application of Law to Facts**

If you have found that the state has proved the offense beyond a reasonable doubt, you must next determine whether the state has proved, beyond a reasonable doubt, at least one of the following:

1. the record, document, or thing made, presented, or used did not display or contain the statement “NOT A GOVERNMENT DOCUMENT” or another substantially similar statement intended to alert a person to the falsity of the record, document, or thing; or
2. the statement was not printed diagonally; or
3. it was not printed clearly and indelibly; or

4. it was not on both the front and back of the record, document, or thing; or
5. it was not in solid red capital letters; or
6. it was not at least one-fourth inch in height.

You must all agree that the state has proved, beyond a reasonable doubt, either element 1, 2, 3, 4, 5, or 6 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1, 2, 3, 4, 5, or 6 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of tampering with a governmental record, and you all agree the state has proved, beyond a reasonable doubt, either element 1, 2, 3, 4, 5, or 6 listed above, you must [find the defendant “guilty”/proceed to consider whether the defendant has proved the defense of no effect on government purpose].

*[Include defense of no effect on government purpose if raised by the evidence; see CPJC 62.21. Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

Tampering with a governmental record is prohibited by and defined in [Tex. Penal Code § 37.10](#). The definition of “governmental record” is from [Tex. Penal Code § 37.01\(2\)](#). The definition of “government” is from [Tex. Penal Code § 1.07\(a\)\(24\)](#). The definition of “harm” is from [Tex. Penal Code § 1.07\(a\)\(25\)](#). For a detailed discussion of the constitutional implications of presumptions in favor of the state, see CPJC 7.1 in *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions*.

The presumption of intent to defraud or harm another may apply to this instruction. However, it may not be well-suited to this means of committing the crime because it does not involve use of a genuine governmental record and it is not clear if Texas Penal Code section 37.10(g) requires an actual governmental record.

**CPJC 62.18 Making, Presenting, or Using a False Governmental Record**

This manner of tampering with a governmental record requires that something meeting the definition of a governmental record was made, presented, or used that the defendant knew was false. *Mendoza v. State*, No. 05-05-00476-CR, 2006 WL 1629762, at \*1 (Tex. App.—Dallas June 14, 2006, no pet.) (not designated for publication) (presenting fake driver’s license did not constitute use of a governmental record with knowledge of its falsity under Texas Penal Code section 37.10(a)(5) because the fake driver’s license met none of the definitions of “governmental record”).

But unlike section 37.10(a)(1), this manner does not require that the document or thing be a governmental record at the moment the defendant puts false information into the document. In *State v. Vasilas*, 187 S.W.3d 486, 491 (Tex. Crim. App. 2006), the defendant presented or used a petition containing false statements by filing it at the clerk’s office. Vasilas argued that the petition did not qualify as a governmental record because it had not yet been received by the government when the false entries in the petition were made. The court of criminal appeals rejected this, distinguishing Vasilas’s case from those prosecuted under section 37.10(a)(1). *Vasilas*, 187 S.W.3d at 491 (citing *Morales v. State*, 11 S.W.3d 460 (Tex. App.—El Paso 2000, pet. ref’d)).

**Defining “Falsity.”** As with Penal Code section 37.10(a)(2), this manner and means requires knowledge of the document or thing’s “falsity.” But because section 37.10(a)(5) requires that the defendant makes or uses an actual governmental record, “knowledge of its falsity” cannot mean the same thing it usually does in section 37.10(a)(2)—i.e., knowledge of its being counterfeit. Nevertheless, “falsity” is not defined by statute, and the Committee believed that fashioning a definition for a pattern jury instruction risked intruding on the jury’s role in applying the ordinary definition. That said, the parties in any case could expressly agree (on the record) to submit a definition that would provide jurors more guidance, such as specifying in the list of elements that “the governmental record was false in that it contained one or more false entries or false information” or providing definitions like the following:

*False Governmental Record*

“False governmental record” means a governmental record that contains one or more false entries or false information.

*Knowledge that the Governmental Record Is False*

“Knowledge that the governmental record is false” means the person is aware that the governmental record contains the false entries or false information.

**CPJC 62.19 Instruction—Tampering with a Governmental Record—  
Making, Presenting, or Using a False Governmental Record**

**INSTRUCTIONS OF THE COURT**

**Accusation**

The state accuses the defendant of having committed the offense of tampering with a governmental record. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., used a governmental record, specifically a petition for expunction, with knowledge of its falsity and with intent to defraud or harm another*].

**Relevant Statutes**

A person commits an offense if the person makes, presents, or uses a governmental record with knowledge of its falsity [with the intent to defraud or harm another].

To prove that the defendant is guilty of tampering with a governmental record, the state must prove, beyond a reasonable doubt, [four/five] elements. The elements are that—

1. the defendant made, presented, or used a document or record;
2. the document or record was a governmental record;
3. it was false; [and]
4. the defendant had knowledge that it was false [; and/.]

*[Include the following element if pleaded.]*

5. the defendant had the intent to defraud or harm another.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of tampering with a governmental record.

## Definitions

### *Governmental Record*

*[Include relevant parts of definition as applicable.]*

“Governmental record” means—

1. anything belonging to, received by, or kept by government for information, including a court record;
2. anything required by law to be kept by others for information of government; or
3. a license, certificate, permit, seal, title, letter of patent, or similar document issued by government, by another state, or by the United States.

### *Government*

“Government” means the state; a county, municipality, or political subdivision of the state; or any branch or agency of the state, county, municipality, or political subdivision.

### *Harm*

“Harm” means anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.

### *Intent to Defraud or Harm Another*

“Intent to defraud or harm another” means the conscious objective or desire to defraud or harm another.

### *Knowledge that the Governmental Record Is False*

“Knowledge that the governmental record is false” means the person is aware that the governmental record is false.

*[Include presumption of intent to harm or defraud another if raised by the evidence; see CPJC 62.20.]*

## Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, [four/five] elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], used [insert specifics, e.g., a petition for expunction];
2. [insert specifics, e.g., the petition for expunction] was a governmental record;
3. [insert specifics, e.g., the petition for expunction] was false; [and]
4. the defendant had knowledge that [insert specifics, e.g., the petition for expunction] was false [; and/.]

*[Include the following element if pleaded.]*

5. the defendant had the intent to defraud or harm another.

You must all agree on elements [1, 2, 3, and 4/1, 2, 3, 4, and 5] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the [four/five] elements listed above, you must [find the defendant “guilty”/proceed to consider whether the defendant has proved the defense of no effect on government purpose].

*[Include defense of no effect on government purpose if raised by the evidence; see CPJC 62.21. Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

Tampering with a governmental record is prohibited by and defined in [Tex. Penal Code § 37.10](#). The definition of “governmental record” is from [Tex. Penal Code § 37.01\(2\)](#). The definition of “government” is from [Tex. Penal Code § 1.07\(a\)\(24\)](#). The definition of “harm” is from [Tex. Penal Code § 1.07\(a\)\(25\)](#). For a detailed discussion of the constitutional implications of presumptions in favor of the state, see CPJC 7.1 in *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions*.



**CPJC 62.20 Instruction—Tampering with a Governmental Record—  
Presumption of Intent to Harm or Defraud Another**

*[Insert instructions for underlying offense.]*

**Presumption of Intent to Harm or Defraud Another**

The law provides for a presumption that may apply in this case. This presumption can apply only if you find the state has proved, beyond a reasonable doubt, that the defendant acted with respect to two or more of the same type of governmental records and each governmental record was a license, certificate, permit, seal, title, or similar document issued by government.

If you find the state has proved, beyond a reasonable doubt, that the defendant acted with respect to two or more of these governmental records, then you may infer from this fact that the defendant had the intent to harm or defraud another. You are not, however, required to infer or find this even if you find that the defendant acted with respect to two or more of the same type of governmental records and each governmental record was a license, certificate, permit, seal, title, or similar document issued by government.

If you have a reasonable doubt about whether the defendant acted with respect to two or more of the same type of governmental records or about whether each governmental record was a license, certificate, permit, seal, title, or similar document issued by government, the presumption does not arise or apply. In that case, you will not consider this presumption for any purpose.

If you conclude you cannot apply the presumption or you choose not to apply it, you must still consider whether—without reference to the presumption—the evidence proves beyond a reasonable doubt that the defendant intended to harm or defraud another.

If you apply this presumption, you may conclude that the state has proved intent to harm or defraud another. If you do decide to apply the presumption to show the state has proved intent to harm or defraud another, you must still find, beyond a reasonable doubt, that the state has proved the remaining elements that it must prove. These remaining elements are that *[include elements of the charged offense]*.

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

**COMMENT**

The presumption of intent to harm or defraud another is provided for by [Tex. Penal Code § 37.10\(g\)](#). For a detailed discussion of the constitutional implications of presumptions in favor of the state, see CPJC 7.1 in *Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions*.

**CPJC 62.21 Instruction—Tampering with a Governmental Record—  
Defense of No Effect on Government Purpose**

*[Insert instructions for underlying offense.]*

**Defense of No Effect on Government Purpose**

If you all agree the state has proved, beyond a reasonable doubt, each of the [number] elements listed above, you must next consider whether the defense of no effect on government purpose applies.

**Relevant Statutes**

It is a defense to prosecution for tampering with a governmental record that the false entry or false information could have had no effect on the government's purpose for requiring the governmental record.

**Burden of Proof**

The defendant is not required to prove this defense. Rather, the state must prove, beyond a reasonable doubt, that the defense does not apply.

**Application of Law to Facts**

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved, beyond a reasonable doubt, that—

1. the government required the record;
2. the government had a purpose for requiring the record; and
3. the false entry or information could have had an effect on that purpose.

You must all agree that the state has proved, beyond a reasonable doubt, all three of these elements.

If you all agree that the state has failed to prove, beyond a reasonable doubt, any of these three elements, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of tampering with a governmental record, and you all agree the state has proved, beyond a reasonable doubt, all three elements rebutting the defense, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

#### COMMENT

The defense of no effect on government purpose is provided for in [Tex. Penal Code § 37.10\(f\)](#).

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## CPJC 63.1 Resisting Arrest Generally

**Obstruction.** Under Texas Penal Code section 38.03, a crime can be committed either by preventing an arrest, search, or transportation or by “obstruct[ing]” it. Obviously, action prevents an arrest, search, or transportation only if the action is successful and the arrest, search, or transportation is not completed.

Obstructing an arrest, search, or transportation apparently means something different and less than preventing it. The term *obstructing* is not defined by statute, and what it requires is not clear. Case law discussions generally do not distinguish between preventing and obstructing or address the meaning of the second term.

One case discussion finds that the court cannot conclude the terms describe different conduct:

In section 38.03, the conduct proscribed is . . . “intentionally prevent[ing] or obstruct[ing] . . . by using force.” [Tex. Penal Code Ann. § 38.03\(a\)](#). We must therefore determine if “preventing” and “obstructing” are different types of conduct. The definition of the word “obstruction” includes “something that impedes or hinders; . . . an obstacle; . . . the act of impeding or hindering; . . . interference.” Black’s Law Dictionary 1107 (8th ed. 2004); *see Hartis [v. State]*, [183 S.W.3d \[793\]](#), 799. “Prevent” is similarly defined as “[t]o hinder or impede.” Black’s Law Dictionary 1226 (8th ed. 2004); *see Hartis*, [183 S.W.3d at 799](#). Both words can be used to mean “hinder” or “impede.” *Hartis*, [183 S.W.3d at 799](#). Based on the definitions and common usage of these words, we cannot conclude that they describe different types of conduct.

*Clement v. State*, [248 S.W.3d 791](#), 801–02 (Tex. App.—Fort Worth 2008, no pet.) (some citations omitted) (preventing and obstructing are not separate offenses for purposes of unanimity analysis).

**Culpable Mental State.** Texas Penal Code section 38.03(a) requires the accused to be proved to have acted “intentionally.” Clearly this applies to preventing or obstructing the arrest, search, or transportation.

Does it also apply to the use of force? This may be of little practical importance—could a defendant intend to prevent an arrest but not intend the force used in an effort to accomplish this? Nevertheless, the Committee concluded the use of force is important enough to the definition of the offense that the culpable mental state “intentionally” will be applied to the use of force. The instruction provides for this.

**Definition of “Using Force.”** The conduct element of Texas Penal Code section 38.03 requires proof of the accused “using force.” The term *force* is “not defined by the Penal Code, and so we interpret [it] in accordance with [its] ordinary meaning.” *Dobbs v. State*, [434 S.W.3d 166](#), 171 (Tex. Crim. App. 2014).

The case law indicates that the proof need not show the defendant made contact with the officer. *Haliburton v. State*, 80 S.W.3d 309, 312–13 (Tex. App.—Fort Worth 2002, no pet.) (“kicking at” officer was use of force). In *Dobbs*, the court of criminal appeals seemed to affirm this. *Dobbs* exhibited a gun and threatened to shoot himself. As to the meaning of “force,” the court explained:

[T]he meaning of the word “force” is “violence, compulsion, or constraint exerted upon or against a person or thing.” Merriam-Webster’s Collegiate Dictionary 455 (10th ed. 1996); *see also* Webster’s New International Dictionary 887 (3d ed. 2002) (further defining force as “violence or such threat or display of physical aggression toward a person as reasonably inspires fear of pain, bodily harm or death”).

The court of criminal appeals further supported this interpretation of the definition in *Finley v. State*, 484 S.W.3d 926, 928 (Tex. Crim. App. 2016). In *Finley*, the court clarified that *Dobbs* had not used force against the officers because he had “never pointed or threatened the officers with the gun” he was holding. *Finley*, 484 S.W.3d at 928. *Finley* reinforces that force could be used against an officer without physical contact occurring.

**Definition of “Arrest.”** Should or must “arrest” be defined? There is authority that the statute does not cover use of force to prevent or obstruct the making of a Terry stop. *United States v. Berry*, 25 F. Supp. 3d 931 (N.D. Tex. 2014). A definition of “arrest” therefore would seem to require excluding such detentions. The instruction contains no definition.

See CPJC 63.9 for further discussion of issues concerning defining “arrest.”

Some cases under the early version of the statute enforced a requirement that the force be used before the arrest (or search) is completed. In 1991, the statute was amended so that the offense can be committed by preventing or obstructing “transportation.” This permits prosecution to be based on the use of force after an arrest has been accomplished and the arrested person is being transported. A definition of arrest that makes clear when the arrest is completed is no longer as necessary as it previously was.

The provision for felony liability under Texas Penal Code section 38.03(d) refers to the use of a deadly weapon “to resist the arrest or search.” Perhaps the use of a deadly weapon to prevent or obstruct transportation cannot give rise to felony liability. On the other hand, it is arguable that force used after an arrest is completed can be said to be used to resist that completed arrest.

**CPJC 63.2 Instruction—Resisting Arrest****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of resisting arrest. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally obstructed a person he knew was a peace officer, namely [name of peace officer], from effecting an arrest of [name] by using force against the peace officer by striking [name of peace officer] with a hammer, a deadly weapon*].

**Relevant Statutes**

A person commits an offense if the person intentionally prevents or obstructs a person he knows is a [peace officer/person acting in a peace officer's presence and at his direction] from effecting an [arrest/search/transportation] of the person or another by using force against [the peace officer/another].

To prove that the defendant is guilty of resisting arrest, the state must prove, beyond a reasonable doubt, [three/four] elements. The elements are that—

1. the defendant intentionally [prevented/obstructed] a [peace officer/person acting in a peace officer's presence and at the officer's direction] from effecting an [arrest/search/transportation] of someone; and
2. the defendant knew the person was a [peace officer/a person acting in a peace officer's presence and at his direction]; [and]
3. the defendant did this by intentionally using force against [the peace officer/another] [./; and]

*[Include the following if raised by the evidence.]*

4. the defendant used a deadly weapon to resist the arrest or search.

It is no defense that the arrest or search was unlawful.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of resisting arrest.



## Definitions

### *Intentionally Preventing Another from Effecting an Arrest, Search, or Transportation*

“Intentionally preventing another from effecting an arrest, search, or transportation” means acting with the conscious objective or desire of preventing the arrest, search, or transportation.

### *Intentionally Obstructing Another from Effecting an Arrest, Search, or Transportation*

“Intentionally obstructing another from effecting an arrest, search, or transportation” means acting with the conscious objective or desire to obstruct the arrest, search, or transportation.

### *Intentionally Using Force*

“Intentionally using force” means to act with the conscious objective or desire to use force.

### *Peace Officer*

“Peace officer” means a person lawfully elected, employed, or appointed as a peace officer.

## Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, [three/four] elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally obstructed [name], a [peace officer/person acting in a peace officer’s presence and at the officer’s direction], from effecting an arrest of [name];
2. the defendant knew [name] was a [peace officer/person acting in a peace officer’s presence and at his direction]; [and]
3. the defendant did this by intentionally using force against [name], a [peace officer/person acting in a peace officer’s presence and at the officer’s direction], by [insert specific allegations, e.g., striking [name] with a hammer] [./; and]

*[Include the following if raised by the evidence.]*

4. the defendant used a deadly weapon, [*insert specific weapon, e.g., a hammer*] to resist the [arrest/search].

*[Continue with the following.]*

You must all agree on elements 1 through [3/4] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through [3/4] above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the [three/four] elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

#### COMMENT

Resisting arrest is prohibited by and defined in [Tex. Penal Code § 38.03](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#). The definition of “peace officer” is from [Tex. Penal Code § 1.07\(a\)\(36\)](#).

### CPJC 63.3 Evading Detention or Arrest Generally

Evading arrest or detention is graded in a quite complicated way. The basic offense is a class A misdemeanor, but it can be raised to felony level in several ways. The Committee's instruction covers one of the ways in which the misdemeanor can be raised to a felony—under [Tex. Penal Code § 38.04\(b\)\(2\)\(A\)](#), the offense is a third-degree felony if the proof shows the defendant “use[d] a motor vehicle while in flight.”

**Separating Elements of the Offense.** Jury instructions discussed by the appellate courts generally combine into one element two matters: (1) knowledge that the attempted arrestor or detainer was a peace officer, and (2) knowledge that the peace officer was attempting to detain or arrest the defendant. The element might be stated as: “The defendant knew that Sergeant James Jackson was a peace officer who was attempting to arrest or detain him.”

This fails to make absolutely clear the need of the state to prove several matters, including two distinct knowledge requirements. The knowingly mens rea term in this statute goes to both: (1) knowledge that the attempted arrestor or detainer is a peace officer, and (2) knowledge that the peace officer is attempting to detain or arrest the defendant.

The Committee concluded these two requirements were best presented as separate elements, thus clarifying the applicable law for the jury.

**Culpable Mental States Required.** [Tex. Penal Code § 38.04\(a\)](#) explicitly requires proof that the defendant knew the person from whom the defendant fled was a peace officer (or federal special investigator) and that the person was attempting to arrest or detain the defendant. *Jackson v. State*, [718 S.W.2d 724](#), 726 (Tex. Crim. App. 1986); *Etheridge v. State*, No. 08-12-00337-CR, 2014 WL 4952804, at \*3 (Tex. App.—El Paso Oct. 1, 2014, no pet.) (not designated for publication) (“Section 38.04(a) requires proof that the defendant knows the peace officer is attempting to arrest or detain him.”).

Must the state prove the defendant knew the arrest or detention being attempted was lawful? A panel of the court of criminal appeals held that this was not required in *Hazkell v. State*, [616 S.W.2d 204](#), 205 (Tex. Crim. App. 1981) (panel). There is some reason to question whether *Hazkell* remains good law.

*Hazkell* was decided under the pre-1993 version of [Tex. Penal Code § 38.04](#), which contained a provision making the unlawfulness of the officer's actions an exception. *Hazkell* relied explicitly on this in reaching its conclusion: “The fact that an unlawful arrest is an exception which must be pled and proved (V.T.C.A. Penal Code, Section 2.02) does not carry with it the responsibility for the State to allege and prove that the accused ‘knew’ he did not come within the exception.” *Hazkell*, [616 S.W.2d at 205](#).

In 1993, the exception was removed and “lawfully” was inserted into section 38.04(a). An argument can be made that after this change, “knows” refers not only to the status of the person from whom the defendant fled and that person’s efforts to arrest or detain the defendant but also to the lawfulness of the attempted arrest or detention. Arguably, the legislature added the lawfulness of the officer’s actions to the list of those things that both must be proved and of which the defendant must be proved to have known.

Nevertheless, Texas courts have assumed *Hazkell* remains controlling, although without considering the effect of the 1993 change in the statutory language and structure. *Etheridge*, 2014 WL 4952804, at \*3 (“Section 38.04(a) . . . does not require proof that the defendant knew his arrest or detention was lawful.”); *Loewe v. State*, No. 03-10-00418-CR, 2011 WL 350462, at \*3 n.3 (Tex. App.—Austin Feb. 2, 2011, pet. ref’d, untimely filed) (not designated for publication) (“It was not necessary for the State to prove that appellant knew that the detention was lawful.”); *Johnson v. State*, No. 13-05-00648-CR, 2007 WL 1021413, at \*2 (Tex. App.—Corpus Christi, Apr. 5, 2007, no pet.) (“It is not required that the State prove that the defendant had knowledge of the legal basis for the attempted detention or arrest.”).

The Committee’s instruction follows what appears to be present law as set out in *Hazkell*. It does not require proof that the defendant knew the attempted detention or arrest was lawful.

**Intentionally Flees.** The conduct element of the offense is fleeing. The flight must be intentional. There is some question whether the meaning of the statutory requirement—that the defendant be proved to have intentionally fled—is clear or adequately conveyed by the statutory terminology.

Much appellate attention has been paid to whether the evidence sufficiently shows defendants were aware that officers were attempting to arrest or detain them. Little attention, however, has been paid to what actions, if this awareness is shown, constitute flight.

Perhaps the leading decision is *Horne v. State*, 228 S.W.3d 442, 445–46 (Tex. App.—Texarkana 2007, no pet.), rejecting arguments “that flight requires an element of speed, an element of intent to ultimately be free of an officer’s control, or both.” *Horne* reasoned that “the cases indicate that ‘fleeing’ is anything less than prompt compliance with an officer’s direction to stop. Thus, such a delayed compliance legitimately can be found to be an attempt to evade arrest or detention.” Multiple cases have made similar findings. See, e.g., *Green v. State*, No. 10-12-00308-CR, 2014 WL 2946274, at \*9 (Tex. App.—Waco June 26, 2014, pet. ref’d) (not designated for publication); *Lopez v. State*, 415 S.W.3d 495, 497 (Tex. App.—San Antonio 2013, no pet.); *Tolbert v. State*, No. 08-10-00096-CR, 2011 WL 3807740, at \*3 (Tex. App.—El Paso Aug. 26, 2011, pet. ref’d) (not designated for publication).

If the evidence shows the defendant wished to delay or shift the location of the officer's intended arrest or detention, almost any action taken pursuant to that intent will apparently constitute fleeing. *Griego v. State*, 345 S.W.3d 742, 751 (Tex. App.—Amarillo 2011, no pet.) (“[W]hile speed, distance, and duration of pursuit may be factors in considering whether a defendant intentionally fled, no particular speed, distance, or duration is required to show the requisite intent if other evidence establishes such intent.”).

**Whether Named Person Is a Peace Officer.** The instruction must require the jury to determine whether the state has proved the person specified as the one from whom the defendant fled was a peace officer or federal special investigator. *Fabela v. State*, 431 S.W.3d 190, 196 (Tex. App.—Amarillo 2014, pet. dismissed) (trial court erred in telling jury, “You are instructed that Chief Deputy Joe Orozco is a peace officer,” because Orozco’s status as a peace officer was an element of the offense and fact that belonged exclusively in province of jury to decide).

**Lawfulness of Arrest or Detention.** The state must prove the arrest or detention that was attempted was “lawful.” Clearly the jury instructions must contain the law defining “lawful” law enforcement activity in the context presented by the facts.

With regards to arrests, the word *lawful* invokes not only the constitutional requirement of probable cause but also the statutory requirement of an arrest warrant.

The Committee’s instruction does this in the definitions unit. It offers barebones instructions for two common situations—those in which the flight was from an effort to arrest for an offense committed in the officer’s presence or view and those in which the flight was from an effort to make an investigatory stop based on reasonable suspicion. In some situations, of course, more and different law may be required to permit the jury to make a determination on the lawfulness of the action from which the state contends the accused fled.

**Use of Vehicle “While in Flight.”** To aggravate the offense to a third-degree felony, the state’s evidence must prove the use of a motor vehicle during the flight. In *Griego v. State*, the court found that proof that the defendant learned after getting out of the vehicle that officers were, and had been, attempting to detain him did not necessarily support a finding that before stopping and getting out of the vehicle the defendant knew officers were attempting to arrest or detain him and that he knowingly fled from them. *Griego*, 345 S.W.3d at 754.

Again, the instruction provides no elaboration on the statutory terminology. No statutory definition of the phrase appears in the Penal Code and the statutory terminology consists of phrases commonly used.

**CPJC 63.4 Instruction—Evading Detention or Arrest****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of evading arrest in a motor vehicle. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., intentionally fled from [name], whom the defendant knew was a peace officer attempting to lawfully detain the defendant, and the defendant used a vehicle while he was in flight*].

**Relevant Statutes**

A person commits an offense if the person intentionally flees from a person that he knows is a peace officer attempting to lawfully detain or arrest him, and the person uses a vehicle while he is in flight.

To prove that the defendant is guilty of evading arrest in a motor vehicle, the state must prove, beyond a reasonable doubt, six elements. The elements are that—

1. the defendant intentionally fled from a peace officer;
2. the peace officer was attempting to arrest or detain the defendant;
3. the defendant knew the person from whom he fled was a peace officer;
4. the defendant knew the person from whom he fled was attempting to arrest or detain the defendant;
5. the attempted arrest or detention was lawful; and
6. the defendant used a vehicle while in flight.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of evading arrest.

**Definitions***Vehicle*

“Vehicle” means a device that can be used to transport or draw persons or property on a highway.

*Intentionally Flees*

A person intentionally flees when it is his conscious objective or desire to flee.

*Knows Is a Peace Officer*

A person knows that another is a peace officer if the person is consciously aware that the other is a peace officer.

*Knows Another Is Attempting to Arrest or Detain*

A person knows another is attempting to arrest or detain the person if the person is consciously aware that the other is attempting to arrest or detain the person.

*[Include the following if the state contends an attempted arrest was lawful because there was reason to believe an offense was committed in the officer's presence or view.]*

*Lawful Arrest*

An arrest by a peace officer is lawful without an arrest warrant if the officer has probable cause to believe the person to be arrested committed an offense in the officer's presence or view.

"Probable cause" as required for an arrest means facts known to the officer that would lead a reasonable law enforcement officer to conclude there is a reasonable probability that a specific person has engaged in criminal activity.

*[Include the following if the state contends an attempted detention was lawful because it was a permissible stop for investigation.]*

*Lawful Attempted Detention*

A brief detention of a person by a peace officer is lawful if the officer has "reasonable suspicion."

"Reasonable suspicion" means facts known to the officer that would lead a reasonable law enforcement officer to reasonably suspect that a specific person has engaged in criminal activity, is engaging in criminal activity, or is about to engage in such activity.

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, six elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally fled from [name], a peace officer;
2. the defendant fled while [name] was attempting to arrest or detain the defendant;
3. the defendant knew [name] was a peace officer;
4. the defendant knew [name] was attempting to arrest or detain the defendant;
5. the attempted arrest or detention was lawful; and
6. the defendant used a vehicle while in flight.

You must all agree on elements 1 through 6 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 6 above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the six elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

**COMMENT**

The crime of evading detention or arrest is provided for in [Tex. Penal Code § 38.04](#). The definition of “vehicle” is from [Tex. Transp. Code § 541.201](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#).



## CPJC 63.5 Hindering Apprehension or Prosecution Generally

Under [Tex. Penal Code § 38.05](#), the offense of hindering apprehension can be committed in a number of ways. The instructions in this chapter cover several of the more common uses of the statute, which include situations in which the basic accusation is that the defendant hindered the apprehension of a person sought by police officers. The instruction at CPJC 63.8 includes the defense provided for in [Tex. Penal Code § 38.05\(b\)](#), covering certain situations in which a warning was given in connection with an effort to bring another into compliance with the law.

**Culpable Mental State.** No culpable mental state beyond those explicitly prescribed by [Tex. Penal Code § 38.05](#) is required. [Tex. Penal Code § 6.02\(b\)](#), (c) is not applicable because [Tex. Penal Code § 38.05\(a\)](#) prescribes a culpable mental state—the intent to hinder the arrest, prosecution, conviction, or punishment of another. One decision by the Texas Court of Criminal Appeals may, however, be read as suggesting more is demanded.

In *Garcia v. State*, [640 S.W.2d 939](#) (Tex. Crim. App. [Panel Op.] 1982), the indictment alleged Garcia did “*intentionally with intent* to hinder the arrest of Lee Roy Licon by providing and aiding in providing said Lee Roy Licon with the means of avoiding arrest or affecting escape, to wit: by placing him in a car and attempting to escape before the officers arrived to arrest Lee Roy Licon.” *Garcia*, [640 S.W.2d at 940](#). The jury instructions required the jury to find in part that Garcia “unlawfully, *knowingly or intentionally* hinder[ed] the arrest of Leroy [sic] Licon.” *Garcia*, [640 S.W.2d at 941](#). The jury instructions were held fundamentally defective because knowledge was neither provided for in the statute nor pled in the information.

*Garcia* might be read as suggesting that the charging instrument must allege not only that the defendant had the intent to hinder the arrest, prosecution, conviction, or punishment of another but also that the defendant acted intentionally in some sense. Charging instruments, in fact, sometimes do this. *See Teal v. State*, [230 S.W.3d 172](#), 174 (Tex. Crim. App. 2007) (indictment alleged appellant “intentionally, with intent to hinder the arrest, prosecution, or punishment of Curtis Brown for the offense of Failure to Comply with Registration as a Sex Offender, did harbor or conceal Curtis Brown”).

In a footnote, however, *Garcia* seemed to make clear that only the culpable mental state explicitly required by [Tex. Penal Code § 38.05](#) is demanded: “The word ‘intentionally’ is superfluous, since the statutory intent to hinder an arrest is alleged.” *Garcia*, [640 S.W.2d at 941 n.3](#).

Hindering apprehension is a felony only if the state proves the accused “knew that the person they harbored, concealed, provided with a means of avoiding arrest or effecting escape, or warned of discovery or apprehension is under arrest for, charged with, or convicted of a felony.” [Tex. Penal Code § 38.05\(d\)](#). This appears to require

proof that the defendant knew the legal nature of the offense that the aided person was arrested for, charged with, or convicted of.

**Texas Penal Code Section 38.05(d) Defense.** Under [Tex. Penal Code § 38.05\(d\)](#), a warning does not constitute a crime if “the warning was given in connection with an effort to bring another into compliance with the law.” The Committee was concerned that the statutory language does not make clear what this requires. Is it enough if the accused was motivated by a desire to bring another into compliance? The language suggests not and perhaps that there must be some other action constituting the effort. Otherwise, there is no effort for the warning to be “in connection with.”

**Definitions of “Harbor” and “Conceal.”** Under [Tex. Penal Code § 38.05\(a\)\(1\)](#), the defendant must “harbor or conceal” the other individual. Case law suggests the terms *harbor* and *conceal* have widely-accepted plain meanings and need not be defined in the instructions:

The word “harbor” is not statutorily defined, and its meaning has not been addressed by a Texas appellate court. Because it is not statutorily defined, we give the word its plain meaning. . . . The word “harbor” has universally accepted meanings. Its most commonly recognized meanings as a verb are “to give shelter to” and “to give refuge to” someone. . . . Further, the definition of “refuge” includes protection, or a source of help, relief, or comfort.

*Urbanski v. State*, [993 S.W.2d 789](#), 793 (Tex. App.—Dallas 1999, no pet.) (citations omitted). “[T]he word ‘conceal’ as used in sections 32.22 and 38.05 reasonably includes both ‘the act of refraining from disclosure’ and ‘the act of removing from sight or notice or hiding . . . .’” *Rotenberry v. State*, [245 S.W.3d 583](#), 589 (Tex. App.—Fort Worth 2007, pet. ref’d).

The discussion in *Rotenberry* raises one possible caveat. It suggests that refraining from disclosure may be concealment for purposes of the offense of hindering. *Rotenberry*, [245 S.W.3d at 589](#). This interpretation is unlikely, in view of the limited provision in [Tex. Penal Code § 6.01\(c\)](#), for liability based on omissions. However, if the evidence in a particular case might be construed as relying on the accused’s failure to disclose information about the person sought, the instruction should make clear that “conceal” requires affirmative action.

**CPJC 63.6     Instruction—Hindering Apprehension by Harboring or Concealing (Misdemeanor)****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of hindering apprehension. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., with intent to hinder the arrest, prosecution, or punishment of [name] for the offense of failure to comply with registration as a sex offender, harbored or concealed [name] by stating to peace officers that [name] was not present at the residence occupied by the defendant at a time when [name] was present*].

**Relevant Statutes**

A person commits an offense if the person, with the intent to hinder the arrest, prosecution, conviction, or punishment of another for an offense, harbors or conceals the other person.

To prove that the defendant is guilty of hindering apprehension, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant harbored or concealed another; and
2. the defendant had the intent to hinder the arrest, prosecution, conviction, or punishment of the other for an offense.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of hindering apprehension.

**Definitions**

*Intent to Hinder the Arrest, Prosecution, Conviction, or Punishment of Another for an Offense*

“Intent to hinder the arrest, prosecution, conviction, or punishment of another for an offense” means the conscious objective or desire to hinder the arrest, prosecution, conviction, or punishment of another for an offense.

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], harbored or concealed [name] by [insert specific allegations, e.g., stating to peace officers that [name] was not present at the residence occupied by the defendant at a time when [name] was present]; and

2. the defendant had the intent to hinder the arrest, prosecution, conviction or punishment of [name] for the offense of [insert specific offense, e.g., failure to comply with registration as a sex offender].

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of the elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the two elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

**COMMENT**

The offense of hindering apprehension or prosecution is provided for in [Tex. Penal Code § 38.05](#)(a). The definition of “intent” is derived from [Tex. Penal Code § 6.03](#).

**CPJC 63.7    Instruction—Hindering Apprehension by Harboring or Concealing (Felony)****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of hindering apprehension. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., with intent to hinder the arrest, prosecution, or punishment of [name] for the offense of murder, a felony, harbored or concealed [name] by stating to peace officers that [name] was not present at the residence occupied by the defendant at a time when [name] was present, knowing that [name] was charged with a felony*].

**Relevant Statutes**

A person commits an offense if the person, with the intent to hinder the arrest, prosecution, conviction, or punishment of another for an offense, harbors or conceals an individual that the person knew was under arrest for, charged with, or convicted of a felony.

To prove that the defendant is guilty of hindering apprehension, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

1.    the defendant harbored or concealed another;
2.    the defendant had the intent to hinder the arrest, prosecution, conviction, or punishment of the other for an offense;
3.    the other person was under arrest for, charged with, or convicted of a felony; and
4.    the defendant knew that the other person was under arrest for, charged with, or convicted of a felony.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of hindering apprehension.

## Definitions

### *Intent to Hinder the Arrest, Prosecution, Conviction, or Punishment of Another for an Offense*

“Intent to hinder the arrest, prosecution, conviction, or punishment of another for an offense” means the conscious objective or desire to hinder the arrest, prosecution, conviction, or punishment of another for an offense.

### *Knew the Person was under Arrest for, Charged with, or Convicted of a Felony*

A person knows that another person is under arrest for, charged with, or convicted of a felony when he is consciously aware that the person is under arrest for, charged with, or convicted of a felony.

### *Felony*

“Felony” means an offense so designated by law or punishable by death or confinement in a penitentiary.

[*Insert specific offense, e.g., Murder*] is a felony.

## Application of Law to Facts

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], harbored or concealed [name] by [*insert specific allegations, e.g., stating to peace officers that [name] was not present at the residence occupied by the defendant at a time when [name] was present*];
2. the defendant had the intent to hinder the arrest, prosecution, conviction, or punishment of [name] for the offense of [*insert specific offense, e.g., murder*];
3. [name] was charged with [*insert specific offense, e.g., murder*], a felony; and
4. the defendant knew that [name] was charged with [*insert specific offense, e.g., murder*], a felony.

You must all agree on elements 1, 2, 3, and 4 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

#### COMMENT

The offense of felony hindering apprehension or prosecution is provided for in [Tex. Penal Code § 38.05](#)(a), (d). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#). The definition of “felony” is derived from [Tex. Penal Code § 1.07\(a\)\(23\)](#).

**CPJC 63.8**    **Instruction—Hindering Apprehension by Warning with  
“Compliance” Defense (Misdemeanor)****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of hindering apprehension. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., with intent to hinder the arrest, prosecution, or punishment of [name] for the offense of theft, warned [name] of impending discovery or apprehension by shouting to [name] that peace officers were present to arrest [name]*].

**Relevant Statutes**

A person commits an offense if the person, with the intent to hinder the arrest, prosecution, conviction, or punishment of another for an offense, warns the other of impending discovery or apprehension.

To prove that the defendant is guilty of hindering apprehension, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant warned another of impending discovery or apprehension; and
2. the defendant had the intent to hinder the arrest, prosecution, conviction, or punishment of the other for an offense.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of hindering apprehension.

**Definitions**

*Intent to Hinder the Arrest, Prosecution, Conviction, or Punishment of Another for an Offense*

“Intent to hinder the arrest, prosecution, conviction, or punishment of another for an offense” means the conscious objective or desire to hinder the arrest, prosecution, conviction, or punishment of another for an offense.



**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], warned [name] of impending discovery or apprehension [*insert specific allegations, e.g., by shouting to [name] that peace officers were present to arrest [name]*]; and

2. the defendant had the intent to hinder the arrest, prosecution, conviction, or punishment of [name] for the offense of [*insert specific offense, e.g., theft*].

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or both of the elements listed above, you must find the defendant “not guilty.”

*[Select one of the following.]*

If you all agree the state has proved, beyond a reasonable doubt, each of the two elements listed above, you must find the defendant “guilty.”

*[or]*

If you all agree the state has proved, beyond a reasonable doubt, each of the two elements listed above, you must next consider whether the defense of encouraging compliance with the law applies.

*[Include the following if raised by the evidence.]*

**Encouraging Compliance with the Law**

You have heard evidence that when the defendant warned [name] of impending discovery or apprehension, he was engaged in an effort to bring [name] into compliance with the law.

**Relevant Statutes**

A person’s conduct that would otherwise constitute the crime of hindering apprehension or prosecution by warning another is not a crime if the warning was given in connection with an effort to bring the other into compliance with the law.

### **Burden of Proof**

The defendant is not required to prove that the defense of encouraging compliance applies to this case. Rather, the state must prove, beyond a reasonable doubt, that the warning was not given in connection with an effort to bring the other into compliance with the law.

### **Application of Law to Facts**

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not within the defense of encouraging compliance with the law.

To decide this issue, you must determine whether the state has proved, beyond a reasonable doubt, that the warning was not given in connection with an effort to bring another into compliance with the law.

You must all agree that the state has proved, beyond a reasonable doubt, that the warning was not given in connection with an effort to bring another into compliance with the law.

If you find that the state has failed to prove, beyond a reasonable doubt, that the warning was not given in connection with an effort to bring another into compliance with the law, you must find the defendant "not guilty."

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of hindering apprehension or prosecution, and you all agree the state has proved, beyond a reasonable doubt, that the warning was not given in connection with an effort to bring another into compliance with the law, you must find the defendant "guilty."

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### **COMMENT**

The offense of hindering apprehension or prosecution is provided for in [Tex. Penal Code § 38.05\(a\)](#). The definition of "intent" is derived from [Tex. Penal Code § 6.03](#). The defense of warning with an effort to bring another into compliance with the law is provided for in [Tex. Penal Code § 38.05\(b\)](#).

## CPJC 63.9    Escape Generally

**Culpable Mental State.** [Tex. Penal Code § 38.06\(a\)](#) does not prescribe a culpable mental state to the offense of escape, so sections 6.02(b) and (c) apply. Section 6.02(c) suggests recklessness is sufficient. There is, however, a complication.

While a culpable mental state applies to the basic conduct element—escaping—section 6.03(c) provides no definition of recklessness as it might apply to elements consisting of the nature of the conduct.

The Committee decided this indicates the legislature did not intend recklessness to apply, at least to the nature of conduct element. Consequently, the instruction requires the defendant to have acted intentionally or knowingly.

If the offense under [Tex. Penal Code § 38.06\(a\)](#) covers a person who escapes while being “lawfully detained for . . . an offense,” does the culpable mental state apply to this circumstance element, and specifically does it require the person have some awareness that the detention is “lawful”? The Committee concluded the Texas courts are unlikely to construe the culpable mental state requirement so as to demand awareness of the law defining when a detention is lawful. As a result, the instruction assumes the culpable mental state applies only to the nature of conduct element—the conduct of escaping.

**Application to Persons Lawfully Detained but Not Arrested When They Escaped.** Careful analysis of the requirements of escape raises some doubts as to its coverage following changes made to the Penal Code in 2011, as well as questions concerning how the basis of these doubts should be reflected in the jury instruction.

The problem arises because [Tex. Penal Code § 38.06\(a\)](#) appears to impose two sets of requirements. First, the state must prove the defendant escaped from custody; custody is defined in [Tex. Penal Code § 38.01\(1\)](#). Second, the state must prove the escape occurred when the person was within one of the three categories set out in section 38.06(a)(1)–(3). In most situations arising from events in the field, the state relies upon section 38.06(a)(1). This requires proof that, at the time of the escape, the accused was under arrest for an offense, lawfully detained for an offense, charged with an offense, or convicted of an offense.

Under the pre-2011 statute, [Tex. Penal Code § 38.06\(a\)\(1\)](#) required the person be “under arrest for, charged with, or convicted of an offense.” In *Warner v. State*, [257 S.W.3d 243](#) (Tex. Crim. App. 2008), the court of criminal appeals held that where the defendant was not charged with or convicted of an offense, an “escape can occur only after an officer *has* successfully restrained or restricted a suspect—that is, when the officer’s grasp has amounted to an arrest.” *Warner*, [257 S.W.3d at 247](#). In *Warner*, a conviction for escape was held unsupported by the evidence when the officer grabbed the defendant Warner but could not subdue him. Since Warner was not successfully arrested, he was not in custody by virtue of an arrest.

In 2011, the legislature amended [Tex. Penal Code § 38.06\(a\)\(1\)](#) by adding the phrase *lawfully detained for*. Acts 2011, 82d Leg., R.S., ch. 1330, § 1 (S.B. 844), eff. Sept. 1, 2011. Apparently the intent was to cover persons like Warner who might be said to have escaped from detention although not from a completed arrest. The legislative history of the revision makes clear that this was its intention: “Senate Bill 844 amends the Penal Code to expand the conditions that constitute the offense of escape from custody to include escaping from custody while lawfully detained for an offense.” S.B. 844, 82d Leg., R.S., Enrolled Bill Summary.

The 2011 legislation did not, however, alter the definition of custody in [Tex. Penal Code § 38.01\(1\)](#). Section 38.06(a) still requires proof the defendant “escape[d] from custody.” Under section 38.01(1), custody exists if the person is:

- (a) under arrest by a peace officer or under restraint by a public servant pursuant to an order of a court of this state or another state of the United States; or
- (b) under restraint by an agent or employee of a facility that is operated by or under contract with the United States and that confines persons arrested for, charged with, or convicted of criminal offenses.

[Tex. Penal Code § 38.01\(1\)](#). If a person who escaped was lawfully detained for an offense but was not under arrest for that offense, the person has not escaped from custody.

A person like Warner seems to escape when he is “lawfully detained for . . . an offense.” But he seems not to escape *from custody* given the definition of that term in section 38.01(1).

If the requirement of custody negates the effort to cover a defendant who has been lawfully detained but not arrested, this is arguably obscured by leaving the requirement of an arrest in the definition of custody. In fact, the instruction suggests escape from nonarrest detention is covered because only by reference to the definition of custody is the lack of coverage made clear.

The Committee drafted the instruction in the arguably inconsistent terms of the statutes. Some members, however, were uncomfortable with what they saw as a potentially misleading inconsistency in the instructions. Nevertheless, the statutory terminology left no other options open.

**Definition of “Arrest.”** Should arrest be defined in the jury instructions? If the statute does not apply to a person detained but not arrested, it is arguable that a definition of arrest that distinguishes arrest from detention is important to implementing the limited scope of the crime.

Two evidence sufficiency cases from the Texas Court of Criminal Appeals—*Medford v. State*, 13 S.W.3d 769 (Tex. Crim. App. 2000), and *Warner*, 257 S.W.3d 243—discuss the subject matter. Article 15.22 of the Texas Code of Criminal Procedure pro-

vides that a person is under arrest “when he has been actually placed under restraint or taken into custody by an officer or person executing a warrant of arrest, or by an officer or person arresting without a warrant.” [Tex. Code Crim. Proc. art. 15.22](#). *Medford* made clear that “neither jurors nor reviewing courts can rely solely on Article 15.22’s definition of arrest as it could be applied in the context of the escape statute.” *Medford*, [13 S.W.3d at 772](#).

*Warner* characterized one of the issues before the court “was whether, in deciding whether an individual is guilty of the offense of escape, a jury is authorized to employ any meaning of the term ‘arrest’ that is acceptable in common parlance.” *Warner*, [257 S.W.3d at 243](#). The court unequivocally held that “it is not,” and added:

[F]or purposes of the escape statute, an “arrest” is complete when a person’s liberty of movement is successfully restricted or restrained, whether this is achieved by an officer’s physical force or the suspect’s submission to the officer’s authority. Furthermore, an arrest is complete only if “a reasonable person in the suspect’s position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest.”

*Warner*, [257 S.W.3d at 247](#) (quoting *Medford*, [13 S.W.3d at 773](#)). Neither case, however, addressed whether the jury instruction could or should include such a definition.

Some members of the Committee concluded that the discussion and rationale of *Medford* and *Warner* indicated that an instruction may and perhaps must include a definition of arrest setting out the substance of that in the cases’ discussions. They believed the instruction should include a definition along the following lines:

“Arrest” means a successful restriction or restraint of a person’s liberty of movement, achieved by either physical force or the suspect’s submission to the arresting individual’s authority. An arrest is complete only if a reasonable person in the suspect’s position would have understood the situation to constitute a restraint on freedom of movement of the degree which a reasonable person would associate with formal arrest.

Other Committee members were unpersuaded that the evidence sufficiency decisions provided strong enough support to justify inclusion of a nonstatutory definition of arrest.

Given the split among the members, the Committee did not include a definition in its proposed instruction.

**Felony Liability of Persons Detained but Not Arrested for a Felony.** Escape becomes a third-degree felony under [Tex. Penal Code § 38.06\(c\)\(1\)](#) if the person “is under arrest for, charged with, or convicted of a felony.” If the crime covers persons

lawfully detained for an offense, the crime does not become a felony because the detention is for a felony. The crime remains a class A misdemeanor.

**Charged with an Offense.** “[A] person is not *charged* with an offense until the filing of a complaint or the return of an indictment by a grand jury.” *Bermen v. State*, 798 S.W.2d 8, 10 (Tex. App.—Houston [1st Dist.] 1990), *pet. dismiss’d, improvidently granted, per curiam sub nom. Hendricks v. State*, 817 S.W.2d 86 (Tex. Crim. App. 1991).

In the absence of case authority that this or any other definition of “charged with . . . an offense” is properly included in the jury instruction, the Committee was unwilling to include any such definition.

**Unlawfulness of the Custody.** Under [Tex. Penal Code § 38.08](#), the unlawfulness of the custody is no defense in a prosecution under section 38.06.

Generally, how should this be handled? The Committee included a statement of this in the relevant statutes unit of CPJC 63.10. Perhaps this should be given only if some evidence suggests the custody is unlawful.

If the state’s theory is that the defendant was detained (rather than arrested, charged, or convicted), the statute states that it applies “when the person is . . . *lawfully* detained for . . . an offense.” [Tex. Penal Code § 38.06\(a\)\(1\)](#) (emphasis added). In such a case, the unlawfulness of the detention is obviously in issue. It is difficult to see how the detention could be unlawful but the custody lawful. Perhaps the general instruction on unlawfulness should not be given if the state relies on proof of detention.

**Secure Correctional Facility or Law Enforcement Facility.** [Tex. Penal Code § 38.06\(c\)\(2\)](#) provides that the offense is a felony if the defendant “is confined or lawfully detained in a secure correctional facility or law enforcement facility.” “Secure correctional facility” is defined in section 1.07(45). The Penal Code has no definition of either “secure law enforcement facility” or “law enforcement facility.” In addition, section 38.06(c)(2) is not clear on whether “secure” applies only to correctional facility or also to law enforcement facility.

Given the lack of a reasonable alternative, the Committee’s instruction passes along the ambiguity by using the ambiguous statutory language.

**Offense as Felony and Other Possible Matters of Law.** Several of the elements, particularly when the state charges a felony violation, raise what might be regarded as matters of law. The indictment may, for example, allege the accused was arrested for possession of a controlled substance and that this offense was a felony. Is whether the offense generally, or on the facts of the case, a felony a matter for the jury? If so, how should the jury be instructed on this?

The same questions might be raised regarding whether a particular facility meets the requirements of section 38.06(c)(2) or (3).

The instruction at CPJC 63.10 contains a separate element for felony cases requiring the jury to address whether the state has proved the aggravating matter. If the state charges a third-degree felony under section 38.06(c)(1), for example, the state must prove that the offense for which the person was arrested, charged, or convicted was a felony.

**Nature of Offense and Defense of Necessity.** Unlike escape crimes in many jurisdictions, escape under the Texas Penal Code is not a continuing offense. It consists of leaving custody and is complete when that is done. As a result, a defendant is entitled to rely on the necessity defense without producing evidence that his remaining at large after leaving custody was justified on necessity-related grounds. *Spakes v. State*, 913 S.W.2d 597, 598 (Tex. Crim. App. 1996) (“We . . . conclude that a person accused of escape need not present evidence of an attempted surrender before a necessity instruction is required, if some evidence otherwise complying with § 9.22 has been presented.”). Federal criminal law holds otherwise. *See United States v. Bailey*, 444 U.S. 394 (1980).

**CPJC 63.10 Instruction—Escape****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of escape. Specifically, the accusation is that the defendant intentionally or knowingly escaped from the custody of [*insert specific allegations, e.g., [name], a peace officer*], when the defendant was [*insert specific allegations, e.g., under arrest for the offense of possession of a controlled substance, a felony*].

**Relevant Statutes**

A person commits an offense if the person intentionally or knowingly escapes from custody when the person is [under arrest for, lawfully detained for, charged with, or convicted of an offense/in custody pursuant to a lawful order of a court/detained in a secure detention facility/in the custody of a juvenile probation officer for violating an order imposed by the juvenile court].

To prove that the defendant is guilty of escape, the state must prove, beyond a reasonable doubt, [two/three] elements. The elements are that—

1. the defendant intentionally or knowingly escaped from custody; [and]
2. this occurred when the defendant was [under arrest for, lawfully detained for, charged with, or convicted of an offense/in custody pursuant to a lawful order of a court/detained in a secure detention facility/in the custody of a juvenile probation officer for violating an order imposed by the juvenile court][./; and]

*[Include one of the following elements if pleaded.]*

3. the defendant was [under arrest for/charged with/convicted of] a felony.

*[or]*

3. the defendant was [confined/lawfully detained] in a secure correctional facility or law enforcement facility.

*[or]*



3. the defendant was committed to or lawfully detained in a secure correctional facility, other than a halfway house, operated by or under contract with the Texas Youth Commission.

*[or]*

3. the defendant caused bodily injury to effect the escape.

*[or]*

3. the defendant caused serious bodily injury to effect the escape.

*[or]*

3. the defendant [used/threatened to use] a deadly weapon to effect the escape.

*[Include the following if the state does not rely on proof that the accused was “detained” and some evidence suggests the custody was unlawful.]*

Whether or not the custody from which the defendant escaped was lawful is of no significance for the defendant’s guilt or innocence.

### **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of escape.

### **Definitions**

#### *Escape*

“Escape” means to [depart without authorization from custody/fail to return to custody following temporary leave for a specific purpose or limited period of time that is part of an intermittent sentence]. Violation of the conditions of community supervision or parole other than conditions that impose a period of confinement in a secure correctional facility does not constitute escape.

#### *Custody*

“Custody” means—

1. under arrest by a peace officer; or
2. under restraint by a public servant pursuant to an order of a court of this state or another state of the United States; or

3. under restraint by an agent or employee of a facility that is operated by or under contract with the United States and that confines persons arrested for, charged with, or convicted of criminal offenses.

*Secure Correctional Facility*

“Secure correctional facility” means—

1. a municipal or county jail; or
2. a confinement facility operated by or under a contract with any division of the Texas Department of Criminal Justice.

*Intentionally Escape from Custody*

A person intentionally escapes from custody if the person has the conscious objective or desire to engage in conduct constituting escape from custody.

*Knowingly Escape from Custody*

A person knowingly escapes from custody if the person is aware that the person’s conduct constitutes escape from custody.

*Bodily Injury*

“Bodily injury” means physical pain, illness, or any impairment of physical condition.

*Serious Bodily Injury*

“Serious bodily injury” means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

*Deadly Weapon*

“Deadly weapon” means—

1. a firearm; or
2. anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or
3. anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, [two/three] elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly escaped from the custody of [insert specific allegations, e.g., [name], a peace officer]; [and]

2. this occurred when the defendant was [insert specific allegations, e.g., under arrest for the offense of possession of a controlled substance][./; and]

*[Include one of the following if applicable.]*

3. the offense for which the defendant was under arrest, [insert specific offense, e.g., possession of a controlled substance] was a felony.

*[or]*

3. the defendant was [confined/lawfully detained] in a secure correctional facility or law enforcement facility.

*[or]*

3. the defendant was committed to or lawfully detained in a secure correctional facility, other than a halfway house, operated by or under contract with the Texas Youth Commission.

*[or]*

3. the defendant, to effect the escape, caused bodily injury.

*[or]*

3. the defendant, to effect the escape, caused serious bodily injury.

*[or]*

3. the defendant, to effect the escape, [used/threatened to use] a deadly weapon.

You must all agree on elements [1 and 2/1, 2, and 3] listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or [both/more] of elements [1 and 2/1, 2, and 3] listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, [both/all three] elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

#### COMMENT

The offense of escape is provided for in [Tex. Penal Code § 38.06](#). The definition of “escape” is based on [Tex. Penal Code § 38.01\(2\)](#). The definition of “custody” is based on [Tex. Penal Code § 38.01\(1\)](#). The definition of “secure correctional facility” is based on [Tex. Penal Code § 1.07\(a\)\(45\)](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#). The definition of “bodily injury” is based on [Tex. Penal Code § 1.07\(a\)\(8\)](#). The definition of “serious bodily injury” is based on [Tex. Penal Code § 1.07\(a\)\(46\)](#). The definition of “deadly weapon” is based on [Tex. Penal Code § 1.07\(a\)\(17\)](#).

CHAPTER 64	STALKING	
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CPJC 64.2	Instruction—Stalking. . . . .	396

## CPJC 64.1 Stalking Generally

The offense of stalking under [Tex. Penal Code § 42.072](#) is a complicated crime containing several elements defined so as to permit the state to prove any of several alternatives. This makes the drafting of an instruction appropriate for use in all cases difficult.

Almost all of the statutory alternatives are provided for in the instruction that follows. The Committee intends that the instruction be edited for use in particular cases, setting out only those alternatives pled in the charging instrument and supported by the evidence. As a result, an edited instruction for a particular case should be considerably shorter than the one in this chapter.

**Incorporation of Harassment.** The first element of stalking can be established by proof that the defendant’s conduct constituted the offense of harassment as prohibited by [Tex. Penal Code § 42.07](#). Harassment, itself, is a complicated crime, so a stalking instruction incorporating harassment becomes particularly complex. Accordingly, the Committee did not provide for this in the instruction because of the complexity it would create and the infrequency with which this manner of committing stalking is likely to be alleged.

**Definition of “Should Know.”** One element of stalking requires proof that the defendant knew or “reasonably should [have known]” that the other person would regard the defendant’s conduct as threatening certain specified consequences. The Committee had some uncertainty as to the meaning of “reasonably should have known.”

This might have been intended to incorporate an ordinary negligence standard as is used in many forms of civil liability. If this was the case, the Penal Code contains no definition of the standard.

The Committee concluded that the legislature must have meant to incorporate into stalking the standard of criminal negligence as defined by [Tex. Penal Code § 6.03\(d\)](#). Generally, [Tex. Penal Code § 6.02\(a\)](#) indicates that “civil” negligence is not a part of the scheme for defining criminal liability. Given this careful provision for and definition of criminal negligence, any legislative intention to use ordinary negligence would be more explicitly expressed.

Consequently, the definition offered by the Committee applies to this element the definition of criminal negligence contained in section 6.03(d).

**CPJC 64.2 Instruction—Stalking****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of stalking. Specifically, the accusation is that the defendant [*insert specific allegations, e.g., pursuant to the same scheme and course of conduct directed specifically at [name], knowingly engaged in conduct that the defendant knew and reasonably should have known that [name] would regard as threatening the infliction of bodily injury and death upon [name], by tracking [name]’s vehicle with one or more tracking devices, sending [name] messages to [name]’s phone, and damaging [name]’s tires, and said conduct would cause a reasonable person to fear, and did cause [name] to be in fear of, the infliction of bodily injury or death upon [name]*].

**Relevant Statutes**

A person commits an offense if the person, on more than one occasion and pursuant to the same scheme or course of conduct that is directed specifically at another person, knowingly engages in conduct that—

1. the person knows or reasonably should know the other person will regard as threatening—
  - a. bodily injury or death for the other person;
  - b. bodily injury or death for a member of the other person’s family or household or for an individual with whom the other person has a dating relationship; or
  - c. that an offense will be committed against the other person’s property; and
2. causes the other person, a member of the other person’s family or household, or an individual with whom the other person has a dating relationship to be placed in fear of bodily injury or death, or in fear that an offense will be committed against the other person’s property, or to feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended; and
3. would cause a reasonable person to—
  - a. fear bodily injury or death for himself;

- b. fear bodily injury or death for a member of the person's family or household or for an individual with whom the person has a dating relationship;
- c. fear that an offense will be committed against the person's property; or
- d. feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended.

To prove that the defendant is guilty of stalking, the state must prove, beyond a reasonable doubt, four elements. The elements are that—

- 1. the defendant on more than one occasion knowingly engaged in conduct;
- 2. the conduct was pursuant to the same scheme or course of conduct;
- 3. the scheme or course of conduct was directed specifically at another person; and
- 4. the conduct on each occasion—
  - a. was conduct the defendant knew or reasonably should have known that the other person would regard as threatening [bodily injury or death for the other person/bodily injury or death for a member of the other person's family or household or for an individual with whom the other person has a dating relationship/that an offense would be committed against the other person's property];
  - b. caused the other person, a member of the other person's family or household, or an individual with whom the other person has a dating relationship to [be placed in fear of bodily injury or death/be placed in fear that an offense would be committed against the other person's property/feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended]; and
  - c. was conduct that would cause a reasonable person to [fear bodily injury or death for himself/fear bodily injury or death for a member of the person's family or household or for an individual with whom the person has a dating relationship/fear that an offense would be committed against the person's property/feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended].



## **Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of stalking.

## **Definitions**

### *Knowingly Engaged in Conduct*

A person knowingly engaged in conduct when he was aware that his conduct was conduct of the kind required by the definition of the offense.

### *Knew Another Person Would Regard Conduct as Threatening*

A person knew another person would regard the conduct of [*insert specific allegations, e.g., tracking another's vehicle with a tracking device*] as threatening [*insert specific allegations, e.g., the infliction of bodily injury or death upon that person*] when he was aware that another person was reasonably certain to regard [*insert specific allegations, e.g., tracking the person's vehicle with a tracking device*] as threatening [*insert specific allegations, e.g., the infliction of bodily injury or death upon the person*].

### *Reasonably Should Know Another Person Would Regard Conduct as Threatening*

A person reasonably should know another person would regard the conduct of [*insert specific allegations, e.g., tracking the other person's vehicle with a tracking device*] as threatening [*insert specific allegations, e.g., the infliction of bodily injury or death upon that person*] when a person, exercising the care that an ordinary person would exercise under all the circumstances as viewed from the defendant's standpoint, would be aware of a substantial and unjustifiable risk that another person would regard [*insert specific allegations, e.g., tracking that person's vehicle with a tracking device*] as threatening [*insert specific allegations, e.g., the infliction of bodily injury or death upon the person*]. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the defendant's standpoint.

## **Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date] and through [date], on more than one occasion knowingly engaged in conduct, specifically [insert specific allegations, e.g.,
  - a. the defendant tracked [name]’s vehicle with one or more tracking devices;
  - b. the defendant sent [name] messages to [name]’s phone; and
  - c. the defendant damaged [name]’s tires];
2. the conduct was pursuant to the same scheme or course of conduct;
3. the scheme or course of conduct was directed specifically at [name], another person; and
4. the conduct on each occasion—
  - a. was conduct the defendant knew or reasonably should have known that [name] would regard as threatening [bodily injury or death upon [name]/bodily injury or death upon a member of [name]’s family or household or for an individual with whom [name] had a dating relationship/that an offense would be committed against [name]’s property];
  - b. was conduct that did cause [name] to be in fear of [bodily injury or death upon [name]/bodily injury or death upon a member of [name]’s family or household or for an individual with whom [name] had a dating relationship/that an offense would be committed against [name]’s property]; and
  - c. was conduct that would cause a reasonable person to fear [bodily injury or death upon [name]/bodily injury or death upon a member of [name]’s family or household or for an individual with whom [name] had a dating relationship/that an offense would be committed against [name]’s property].

You must all agree on elements 1 through 4 listed above.

You need not all agree on whether the state has proved [insert item numbers specifically alleged in element 1 above, e.g., 1.a, 1.b, or 1.c], but you must all agree that the state has proved the defendant engaged in conduct meeting the descriptions on more than one occasion during the specified period.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1 through 4 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

#### COMMENT

Stalking is prohibited by and defined in [Tex. Penal Code § 42.072](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#).

CHAPTER 65	GAMBLING OFFENSES	
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## CPJC 65.1 Gambling Generally

Texas Penal Code chapter 47 has five distinct sections providing different offenses concerning gambling. This chapter includes instructions for the misdemeanor offenses of gambling under [Tex. Penal Code § 47.02\(a\)\(1\)](#) and (3) and gambling promotion under [Tex. Penal Code § 47.03\(a\)\(1\)](#). The Committee has not included instructions for keeping a gambling place, communicating gambling information, or possession of gambling devices, equipment, or paraphernalia.

Three defenses to the offense of gambling are contained in section 47.02. Furthermore, section 47.09 provides three additional defenses that apply to all gambling offenses listed in chapter 47. Many of the defenses involve participation in the state lottery or other activities permitted under various statutes, such as bingo or charitable raffles. Only a select number of defenses are included in this chapter. The Committee agreed that including all the defenses in the pattern jury instruction would make the instruction cumbersome and likely unhelpful given that the defenses are seldom invoked.

The instructions for gambling under section 47.02(a)(1) and (3) include two of the more likely defenses—private gambling and playing with a nongambling device.

**Applying Culpable Mental State Requirement.** [Tex. Penal Code § 47.02](#) supplies no culpable mental state for the offense of gambling. Under [Tex. Penal Code § 6.02](#), if the definition of an offense does not prescribe a culpable mental state, then intent, knowledge, or recklessness suffices to establish criminal responsibility. Section 6.03(c) makes no provision for applying recklessness to the conduct constituting a crime, and the Committee was confident the required culpable mental state applies to the conduct—making a bet. Consequently, the Committee decided the legislature did not intend recklessness to apply to this offense. Accordingly, the instruction provides the accused must have acted intentionally or knowingly.

**Affirmative Defense Created by Section 47.09.** [Tex. Penal Code § 47.09](#) provides one affirmative defense for offenses under section 47.04, 47.05, and 47.06. The affirmative defense deals with ocean-going vessels upon which gambling activities are conducted. Under section 2.04(c), the affirmative defense is not submitted to the jury unless evidence is admitted supporting the defense. Further, if the affirmative defense is submitted, the defendant must prove the affirmative defense by a preponderance of the evidence. The Committee decided not to draft an instruction for the affirmative defense provided in section 47.09(b) related to ocean-going vessels because the defense is seldom raised and limited in its application. For example, the ocean-going vessel affirmative defense is unavailable to a person charged with gambling under section 47.02 or gambling promotion under section 47.03. See [Tex. Penal Code § 47.09\(b\)](#).

**Evidence and Testimonial Immunity.** Two sections in chapter 47 deal with evidentiary matters in gambling prosecutions. Section 47.07 appears to relax the burden

on the state to show that a sporting event, which gave rise to the culpable gambling conduct, actually occurred. Section 47.08 essentially bars the state from offering testimony by the defendant, when the defendant testifies about the gambling activity. For example, if the defendant testifies that he was present during an illegal poker tournament, the state cannot use that testimony in the prosecution against him.

**CPJC 65.2 Instruction—Gambling—Game, Contest, or Performance****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of gambling. Specifically, the accusation is that the defendant intentionally or knowingly made a bet [on the partial or final result of a game or contest [*insert specific allegations, e.g., by betting that Baylor would beat the University of Texas in the November 12, 2015, football game*]/on the performance of a participant in a game or contest [*insert specific allegations, e.g., by betting that the Baylor quarterback would throw five touchdown passes in the November 12, 2015, football game against the University of Texas*]].

**Relevant Statutes**

A person commits an offense if the person intentionally or knowingly makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest.

To prove that the defendant is guilty of gambling, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant intentionally or knowingly made a bet; and
2. the bet was [on the partial or final result of a game or contest/on the performance of a participant in a game or contest].

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of gambling.

**Definitions***Intentionally Makes a Bet*

“Intentionally makes a bet” means making a bet with the conscious objective or desire to make a bet.

*Knowingly Makes a Bet*

“Knowingly makes a bet” means making a bet with awareness one is making a bet.

*Bet*

“Bet” means an agreement to win or lose something of value solely or partially by chance.

*[Include the following if raised by the evidence.]*

A bet does not include—

1. contracts of indemnity or guaranty or life, health, property, or accident insurance;
2. an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest; or
3. an offer of merchandise, with a value not greater than \$25, made by the proprietor of a bona fide carnival contest conducted at a carnival sponsored by a nonprofit religious, fraternal, school, law enforcement, youth, agricultural, or civic group, including any nonprofit agricultural or civic group incorporated by the state before 1955, if the person to receive the merchandise from the proprietor is the person who performs the carnival contest.

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly made a bet; and
2. the bet was [on the partial or final result of a game or contest [insert specific allegations, e.g., specifically that Baylor would beat the University of Texas in the football game to be played on November 12, 2015]/on the performance of a participant in a game or contest [insert specific allegations, e.g., specifically that the Baylor quarterback would throw five touchdown passes in the November 12, 2015 football game against the University of Texas]].

You must all agree on elements 1 and 2 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, either of the two elements listed above, you must find the defendant “not guilty.”



*[Select one of the following.]*

If you all agree the state has proved, beyond a reasonable doubt, both of the elements listed above, you must find the defendant “guilty.”

*[or]*

If you all agree the state has proved, beyond a reasonable doubt, both of the elements listed above, you must next consider whether the defense of *[insert defense, e.g., private gambling]* applies.

*[Include the following if raised by the evidence.]*

### **Private Gambling**

You have heard evidence that, when the defendant *[insert specific allegations, e.g., bet that Baylor would beat the University of Texas in the football game to be played on November 12, 2015]*, the defendant was gambling in a private place, no person received any economic benefit, and the chances of winning were the same for all participants.

### **Relevant Statutes**

A person’s conduct that would otherwise constitute the crime of gambling is not a criminal offense if—

1. the actor engaged in gambling in a private place;
2. no person received any economic benefit other than personal winnings; and
3. except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

### **Burden of Proof**

The defendant is not required to prove that the defense of private gambling applies to this case. Rather, the state must prove, beyond a reasonable doubt, that the defense does not apply.

## Definitions

### *Private Place*

“Private place” means a place to which the public does not have access and excludes, among other places, streets, highways, restaurants, taverns, night-clubs, schools, hospitals, and the common areas of apartment houses, hotels, motels, office buildings, transportation facilities, and shops.

## Application of Law to Facts

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant’s conduct was not within the defense of private gambling.

To decide the issue of private gambling, you must determine whether the state has proved, beyond a reasonable doubt, that either—

1. the defendant was not engaged in gambling in a private place;
2. at least one person received an economic benefit other than personal winnings; or
3. except for the advantage of skill or luck, the risks of losing and the chances of winning were not the same for all participants.

You must all agree that the state has proved one or more of elements 1, 2, or 3 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, any of elements 1, 2, or 3 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of gambling, and you all agree the state has proved, beyond a reasonable doubt, one of the three elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

## COMMENT

Gambling is prohibited by and defined in [Tex. Penal Code § 47.02\(a\)](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#). The definition

of “bet” is based on [Tex. Penal Code § 47.01\(1\)](#). The definition of “private place” is based on [Tex. Penal Code § 47.01\(8\)](#). The defense of private gambling is provided for in [Tex. Penal Code § 47.02\(b\)](#).

**CPJC 65.3     Instruction—Gambling—Using Cards, Dice, Balls, or Other Devices****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of gambling. Specifically, the accusation is that the defendant intentionally or knowingly played and made a bet for money or other thing of value at [*insert specific allegations, e.g., a poker game played with cards*].

**Relevant Statutes**

A person commits an offense if the person intentionally or knowingly plays and bets for money or other thing of value at any game played with cards, dice, balls, or any other gambling device.

To prove that the defendant is guilty of gambling, the state must prove, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant intentionally or knowingly played and bet;
2. the bet was for money or other thing of value; and
3. the playing was at a game played with cards, dice, balls, or any other gambling device.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of gambling.

**Definitions***Intentionally Play and Bet*

“Intentionally play and bet” means playing and betting with the conscious objective or desire to play and bet.

*Knowingly Play and Bet*

“Knowingly play and bet” means playing and betting with awareness that one is playing and betting.

*Thing of Value*

“Thing of value” means any benefit, but does not include an unrecorded and immediate right of replay not exchangeable for value.

*Bet*

“Bet” means an agreement to win or lose something of value solely or partially by chance.

*[Include the following if raised by the evidence.]*

A bet does not include—

1. contracts of indemnity or guaranty or life, health, property, or accident insurance;
2. an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest; or
3. an offer of merchandise, with a value not greater than \$25, made by the proprietor of a bona fide carnival contest conducted at a carnival sponsored by a nonprofit religious, fraternal, school, law enforcement, youth, agricultural, or civic group, including any nonprofit agricultural or civic group incorporated by the state before 1955, if the person to receive the merchandise from the proprietor is the person who performs the carnival contest.

*Gambling Device*

“Gambling device” means any electronic, electromechanical, or mechanical contrivance not excluded under the second paragraph below that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance, even though accompanied by some skill, whether or not the prize is automatically paid by the contrivance. The term—

1. includes, but is not limited to, gambling device versions of bingo, keno, blackjack, lottery, roulette, video poker, or similar electronic, electromechanical, or mechanical games, or facsimiles thereof, that operate by chance or partially so, that as a result of the play or operation of the game award credits or free games, and that record the number of free games or

credits so awarded and the cancellation or removal of the free games or credits; and

2. does not include any electronic, electromechanical, or mechanical contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than ten times the amount charged to play the game or device once or \$5, whichever is less.

### **Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, three elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], intentionally or knowingly played and bet;
2. the bet was for money or anything of value; and
3. the playing was at a game played with cards, dice, balls, or any other gambling device [insert specific allegations, e.g., specifically a poker game played with cards].

You must all agree on elements 1, 2, and 3 listed above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the elements listed above, you must find the defendant “not guilty.”

*[Select one of the following.]*

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must find the defendant “guilty.”

*[or]*

If you all agree the state has proved, beyond a reasonable doubt, each of the three elements listed above, you must next consider whether the defense of [insert defense, e.g., playing with a nongambling device] applies.

*[Include the following if raised by the evidence.]*

### **Playing with a Nongambling Device**

You have heard evidence that, when the defendant [*insert specific conduct constituting offense, e.g., played and bet in a poker game*], the defendant was a person who played for something of value other than money using an electronic, electromechanical, or mechanical contrivance excluded from the definition of a gambling device.

### **Relevant Statutes**

A person's conduct that would otherwise constitute the crime of gambling is not a criminal offense if the person played for something of value other than money using an electronic, electromechanical, or mechanical contrivance excluded from the definition of gambling device.

### **Burden of Proof**

The defendant is not required to prove that the defense of playing with a nongambling device applies to this case. Rather, the state must prove, beyond a reasonable doubt, that the defense does not apply.

### **Application of Law to Facts**

If you have found that the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant was playing with a gambling device.

To decide the issue of whether the defendant was playing with a gambling device, you must determine whether the state has proved, beyond a reasonable doubt, that either—

1. the defendant did not play for something of value other than money; or
2. the defendant did not use an electronic, electromechanical, or mechanical contrivance that was not excluded from the definition of gambling device.

You must all agree the state has proved either element 1 or 2 listed above. You need not agree on which of these elements the state has proved.

If you find that the state has failed to prove, beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of gambling, and you all agree the state has proved,

beyond a reasonable doubt, either element 1 or 2 listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

### COMMENT

Gambling is prohibited by and defined in [Tex. Penal Code § 47.02\(a\)](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#). The definition of “bet” is based on [Tex. Penal Code § 47.01\(1\)](#). The definition of “thing of value” is based on [Tex. Penal Code § 47.01\(9\)](#). The definition of “gambling device” is based on [Tex. Penal Code § 47.01\(4\)](#). The defense of playing with a nongambling device is provided for in [Tex. Penal Code § 47.02\(e\)](#).

For the section of the instruction concerning the defendant’s possible use of a non-gambling device, the Committee decided to closely track the statutory language. A majority of the Committee wanted to provide alternative language to the practitioner because the alternative language may, in some circumstances, make more sense to a jury. On the other hand, the Committee was concerned that altering the statutory language may alter the burden of proof on the state when faced with the defense. With that in mind, the Committee recommends the following possible alternative language to that given in the application of law to facts unit of the defense:

1. the defendant played for money; or
2. the defendant used a gambling device.



**CPJC 65.4 Instruction—Gambling Promotion****INSTRUCTIONS OF THE COURT****Accusation**

The state accuses the defendant of having committed the offense of gambling promotion. Specifically, the accusation is that the defendant intentionally or knowingly operated or participated in the earnings of a gambling place [*insert specific allegations, e.g., a building one of the uses of which was the playing of eight liner gambling devices*].

**Relevant Statutes**

A person commits an offense if the person intentionally or knowingly operates or participates in the earnings of a gambling place.

To prove that the defendant is guilty of gambling promotion, the state must prove, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant [operated/participated in the earnings of] a gambling place; and
2. the defendant did this intentionally or knowingly.

**Burden of Proof**

The state must prove, beyond a reasonable doubt, the accusation of gambling promotion.

**Definitions***Intentionally Operate a Gambling Place*

“Intentionally operate a gambling place” means to operate a gambling place with the conscious objective or desire to operate the place and with awareness that the place is a gambling place.

*Knowingly Operate a Gambling Place*

“Knowingly operate a gambling place” means to operate a gambling place with awareness that one is operating the place and that the place is a gambling place.

*Intentionally Participating in the Earnings of a Gambling Place*

“Intentionally participating in the earnings of a gambling place” means to participate in the earnings of a gambling place with the conscious objective or desire to so participate in the earnings and with awareness that the place is a gambling place.

*Knowingly Participating in the Earnings of a Gambling Place*

“Knowingly participating in the earnings of a gambling place” means to participate in the earnings of a gambling place with awareness that one is participating in the earnings and that the place is a gambling place.

*Gambling Place*

“Gambling place” means any real estate, building, room, tent, vehicle, boat, or other property whatsoever, one of the uses of which is the making or settling of bets, bookmaking, or the conducting of a lottery or the playing of gambling devices.

*Bookmaking*

“Bookmaking” means—

1. to receive and record or to forward more than five bets or offers to bet in a period of twenty-four hours;
2. to receive and record or to forward bets or offers to bet totaling more than \$1,000 in a period of twenty-four hours; or
3. a scheme by three or more persons to receive, record, or forward a bet or an offer to bet.

*Thing of Value*

“Thing of value” means any benefit, but does not include an unrecorded and immediate right of replay not exchangeable for value.

*Bet*

“Bet” means an agreement to win or lose something of value solely or partially by chance.

*[Include the following if raised by the evidence.]*

A bet does not include—

1. contracts of indemnity or guaranty or life, health, property, or accident insurance;
2. an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest; or
3. an offer of merchandise, with a value not greater than \$25, made by the proprietor of a bona fide carnival contest conducted at a carnival sponsored by a nonprofit religious, fraternal, school, law enforcement, youth, agricultural, or civic group, including any nonprofit agricultural or civic group incorporated by the state before 1955, if the person to receive the merchandise from the proprietor is the person who performs the carnival contest.

### *Lottery*

“Lottery” means any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win anything of value, whether such scheme or procedure is called a pool, lottery, raffle, gift, gift enterprise, sale, policy game, or some other name.

### **Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, two elements. The elements are that—

1. the defendant, in [county] County, Texas, on or about [date], [operated/participated in the earnings of] a gambling place [insert specific allegations, e.g., a building one of the uses of which was the playing of eight liner gambling devices]; and
2. the defendant did this intentionally or knowingly.

You must all agree on elements 1 and 2 above.

If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of the elements listed above, you must find the defendant “not guilty.”

If you all agree the state has proved, beyond a reasonable doubt, each of the two elements listed above, you must find the defendant “guilty.”

*[Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions.]*

**COMMENT**

Gambling promotion is prohibited by and defined in [Tex. Penal Code § 47.03](#). The definitions of culpable mental states are derived from [Tex. Penal Code § 6.03](#). The definition of “bet” is based on [Tex. Penal Code § 47.01\(1\)](#). The definition of “gambling place” is based on [Tex. Penal Code § 47.01\(3\)](#). The definition of “bookmaking” is based on [Tex. Penal Code § 47.01\(2\)](#). The definition of “lottery” is based on [Tex. Penal Code § 47.01\(7\)](#). The definition of “thing of value” is based on [Tex. Penal Code § 47.01\(9\)](#). The definition of “gambling device” is based on [Tex. Penal Code § 47.01\(4\)](#).

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Following are the tables of contents of the most recent editions of the *Texas Criminal Pattern Jury Charges* series. The practitioner may also be interested in the civil *Texas Pattern Jury Charges* series. Please visit <http://texasbarbooks.net/texas-pattern-jury-charges/> for more information.

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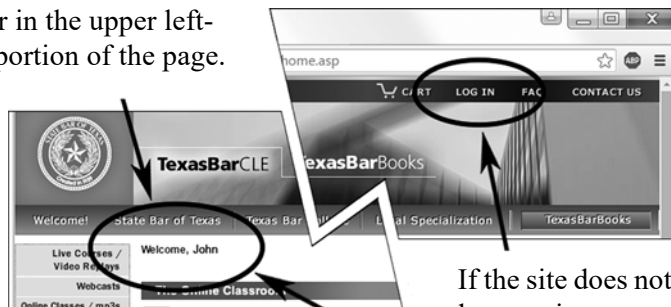
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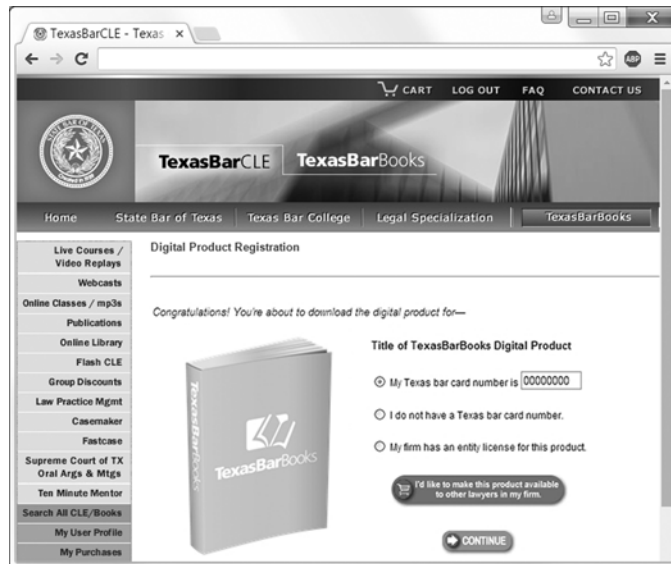


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